IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-630

PAUL HALL, individually and as President or AL KERR, as Secretary-Treasurer, or EARL SHEPARD, as Vice President, or CAL TANNER, as Executive Vice President of the Seafarers International Union of North America-Atlantic, Gulf, Lakes and Inland Waters District,

Petitioners,

v.

JOHN COLE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Chronological List of Relevant Docket Entries

May 27, 1964—Plaintiff's Amended Complaint.

June 30, 1965—Defendants Amended Answer.

February 2, 1967—Excerpt from District Court Opinion on Plaintiff's Motion Objecting to Interrogatories Propounded by Defendants.

May 21, 1971—Findings of Fact and Conclusions of Law of District Court.

May 21, 1971—Decision and Order of District Court.

August 6, 1971—Supplemental Decision and Order of District Court.

September 13, 1971—Amended Findings of Fact of District Court.

November 10, 1971—Judgment of District Court.

December 3, 1971—Defendants Notice of Appeal.

June 22, 1972—Opinion and Order of Court of Appeals.

July 24, 1972—Order of Court of Appeals Denying Petition for Rehearing.

Excerpt from District Court Opinion on Plaintiff's Motion Objecting to Interrogatories

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

JOHN J. COLE,

Plaintiff,

against

PAUL HALL, individually and as President or AL KERR, as Secretary-Treasurer, or EARL SHEPARD, as Vice-President, or CAL TANNER, as Executive Vice-President of the SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA-ATLANTIC, GULF, LAKES AND INLAND WATERS DISTRICT,

Defendants.

"The plaintiff, it was established without dispute at the hearing, is an ordinary seaman with the modest wage of his calling and is represented by counsel assigned by the Civil Liberties Union. Though the services of counsel are rendered gratis, plaintiff has paid at least part of the disbursements."

Findings of Fact and Conclusions of Law of District Court

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

Contained in Appendix attached to Petition for Certiorari as Appendix E pages 23a through 39a.

Decision and Order of District Court

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

Contained in Appendix attached to Petition for Certiorari as Appendix C, pages 10a through 21a.

Supplemental Decision and Order of District Court

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

Contained in Appendix attached to Petition for Certiorari as Appendix D, page 22a.

Amended Findings of Fact of District Court

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

Contained in Appendix attached to Petition for Certiorari as Appendix F, pages 40a through 42a.

Judgment of District Court

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

The above matter having come on for trial before the Honorable Jacob Mishler, United States District Judge, and the issues having been duly tried and the court having rendered a decision and having made findings of fact and conclusions of law filed in the office of the Clerk on May 21, 1971, and the court having filed a supplemental memorandum of decision and order made and filed on August 6, 1971 and amended the aforesaid findings of fact by order made and filed September 13, 1971, it is

ORDERED, ADJUDGED AND DECREED that plaintiff be reinstated to membership and restored to all the financial benefits accruing to members of the defendant labor organization; and it is further

ORDERED, ADJUDGED AND DECREED that the plaintiff recover from the defendant Seafarers International Union of North America, Atlantic, Gulf, Lakes and Inland Waters District, the sum of $5,500, as and for counsel fees, costs and disbursements (as agreed between the parties, preserving the defendants' right to challenge the award) and the said defendants is directed to pay the said sum of $5,500 to plaintiff's counsel, Burton H. Hall; and it is further

ORDERED, ADJUDGED AND DECREED that the complaint be and the same hereby is dismissed as to defendants Paul Hall, Al Kerr, Earl Shepard and Cal Tanner.

Dated: Brooklyn, New York
November 10, 1971

JACOB MISHLER
U. S. D. J.

Opinion and Order Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 72-1003

JOHN J. COLE,

Plaintiff-Appellee,

against

PAUL HALL, individually and as President or AL KERR, as Secretary-Treasurer, or EARL SHEPARD, as Vice-President, or CAL TANNER, as Executive Vice-President of the SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA-ATLANTIC, GULF, LAKES AND INLAND WATERS DISTRICT,

Defendants-Appellants.

Contained in Appendix attached to Petition for Certiorari as Appendix B, pages 2a through 9a.

Order of Court of Appeals denying Petition for Rehearing

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

[SAME TITLE]

Contained in Appendix attached to Petition for Certiorari as Appendix G, page 43a.

72-630 FILE COPY

FILED

OCT 24 1972

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1972

No. 72-630

PAUL HALL, individually and as President or AL KERR, as Secretary Treasurer, or EARL SHEPARD, as Vice President, or CAL TANNER, as Executive Vice President of the Seafarers International Union of North America—Atlantic, Gulf, Lakes and Inland Waters District,

Petitioners,

v.

JOHN COLE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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New York, New York

RESPONSE NOT PRINTED

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IN THE

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No.

PAUL HALL, individually and as President or AL KERR, as Secretary Treasurer, or EARL SHEPARD, as Vice President, or CAL TANNER, as Executive Vice President of the Seafarers International Union of North America—Atlantic, Gulf, Lakes and Inland Waters District,

Petitioners,

v.

JOHN COLE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals entered in the above entitled case on June 22, 1972.

Opinions Below

The opinion of the Court of Appeals for the Second Circuit which is reprinted in Appendix B is officially reported at 462 F. 2d 777. The opinion and order of the District Court for the Eastern District of New York which

is reprinted in Appendix C, is not officially reported but is unofficially reported at 66 LC para. 11,953. The District Court's supplemental decision and order which is reprinted in Appendix D is not reported. The District Court's findings of fact and conclusions of law which is reprinted in Appendix E is not officially reported. The District Court's amended findings of fact which is reprinted in Appendix F is not officially reported. The order of the Court of Appeals denying petition for rehearing which is reprinted in Appendix G is not officially reported.

Jurisdiction

The judgment of the Court of Appeals was entered on June 22, 1972. The order of the Court of Appeals denying a petition for rehearing was entered on July 24, 1972. This Court has jurisdiction to review the judgment herein by writ of certiorari under 28 USC Section 1254(1).

Questions Presented

1. Whether a federal court in a Section 102 proceeding, reviewing an expulsion of a member by a union, finding his expulsion in violation of Section 101(a)(2), and directing his restoration to membership, may also award the member's attorney reasonable counsel fees.

2. Whether a federal court in a Section 102 proceeding, in restoring an expelled member to membership, may award reasonable counsel fees when it is found that the member sustained no damages by reason of the expulsion; additionally found that the union in good faith believed it had the right to discipline the member for his conduct; further found no motivation of malice by the union in its discipline of the member and does not find that the member

by his conduct acted in good faith, but instead concludes the member's conduct was motivated in part for personal political ambitions.

3. Whether the proviso contained in Section 101(a)(2)[1] precludes a federal court from restoring to union membership a member expelled after union hearing for intentionally advocating and proposing action at a union meeting with knowledge of the foreseeable serious adverse consequences upon the union as an institution; particularly where such advocated action is found by the trial court to be such, as may be the cause and result of the union membership sustaining loss of employment opportunities and reducing both the union membership and its treasury.

Statutes Involved

The pertinent provisions of the Labor Management Reporting and Disclosure Act, 73 Stat. 523, 29 U.S.C. Sec. 411 *et. seq.*—Sections 101(a)(2), 102, 29 U.S.C. Sec. 411(a)(2), 412, are set out in Appendix A, *infra*.

Statement of the Case

The defendant, Seafarers International Union of North America, Atlantic, Gulf, Lakes, Inland Water District (hereafter SIU), a union whose members are merchant seamen, since about 1940, has competed with the National Maritime Union (hereafter NMU), for membership among

[1] Section 101(a)(2) * * *: Provided, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

unlicensed merchant marine seamen. The SIU was formerly affiliated with the CIO, prior to the merger of the AFL-CIO (App. E, para. 11).* All employment opportunities for merchant seamen including the plaintiff Cole, arises from contracts between the union (SIU or NMU) and employers, with the union referring for employment on a seniority basis its members and registrants to man the vessels, from a union hiring hall operated by the union. By virtue of such contracts the employer makes contributions on account of men employed, to funds maintained with the union (SIU or NMU) to provide pension, welfare and vacation benefits for its members (App. F, para. 12(a)). At the time of the trial, plaintiff Cole had retired and was receiving a $250 monthly pension benefit from such fund (App. E, para. 27(z)). Throughout the years, including the times pertinent here, there has been extensive and intense rivalry between the SIU and the NMU for contracts with ship owners for jobs and referral of the same from their respective hiring halls (82a, 83a, 86a).** Such rivalry culminated in many jurisdictional disputes (90a, 148a)—similar to two fierce business competitors for the same market, which is rapidly decreasing, such as the American merchant marine whose market for carriage of American seaborne commerce in approximately a score of years has markedly decreased to only 6% of such carriage with consequential loss of employment opportunities for American seamen (90a, 148a).

Cole was fully knowledgable of the foregoing facts, the intricate workings and problems of the unions, to secure and maintain employment for their members viza their rival—the competitor union, and in fact had written articles upon the subject (83a, 87a, 88a). He further knew, that

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* App. refers to the Appendices attached.

** Numbers followed with letter "a" refer to the Appendix record certified by the Court of Appeals.

when his union the SIU, lost contracted vessels to the NMU, the SIU members lost job opportunities (86a); and jobs for vessels under contract, their preservation and securing of the same, was the foundation of the SIU, it's prime responsibility as an institution (129a). Cole further knew that the SIU's making of mutual assistance pacts with maritime unions representing officers aboard American merchant vessels, particularly the licensed engineer officers unions, were crucial to the SIU's prime purpose in preserving and securing contracted vessels—employment opportunities, in its intense rivalry and competition with the NMU (119a). Cole aknowledged that such mutual aid or assistance pacts were " * * * to protect our (SIU members) jobs" (124a).

Prior to the August, 1962 incident giving rise to Cole's expulsion from the SIU, his daughter in 1955, had been awarded a college scholarship by the Seafarers Welfare Plan (App. E, para. 8a-c). The following year the scholarship was revoked because of her failure to maintain a B average in accordance with the conditions of the grant (App. E, para. 8(d)). Shortly thereafter Cole commenced a campaign of grievances, complaints and criticisms against the union and its officers, the motivation therefor as explained by him, was his resentment over the revocation of his daughter's scholarship (App. E, para. 10). Such campaign, its scurrilous nature, its constant implementation including correspondence, publications and resolutions introduced at membership meetings, criticizing officers and opposing dues increases, etc., continued unabated for many years (73a-78a, 94a, 118). Such conduct evoked no disciplinary action by the union or its officers against Cole. On the contrary, Cole admittedly was advised, that if he felt the union or its officers had acted improperly he was required to make " * * * a full report to the authorities" (80a, 81a). In fact, notwithstanding Cole's above constant campaign against the union and its officers, no action was

ever taken against him therefor as the union considered such campaign his exercise of free speech—significantly as Cole admitted, "The union apprised me of my right of free speech" (77a).

Previously in 1957, Seas Shipping Corp. operated eight vessels under the name of Robin Line under contract with the SIU. The vessels were sold to Moore McCormack Lines whose vessels were subject to a contract with the NMU and the latter sought to have all the purchased vessels made subject to their collective bargaining agreement. This conduct brought about a jurisdictional dispute in which the licensed officers unions assisted the SIU pursuant to their mutual assistance pact. Ultimately the dispute was resolved by the NLRB with the SIU retaining under contract seven of such vessels and the NMU, the remaining one (App. F, para. 12(b)).

In early 1962, NMU instituted the same jurisdictional dispute—a raid against the SIU to place the seven remaining Robin Line vessels under its contract with Moore McCormack Lines. Such conduct precipitated picketing by the SIU and assistance from the licensed engineer officer unions. In addition, SIU filed unfair labor practice charges with the NLRB which eventually ruled in its favor. Simultaneously the SIU filed raiding charges against the NMU with the AFL-CIO which also ruled in favor of the SIU and the NMU's raid was repulsed (App. F, para. 12(c)).

In early 1962, in accordance with its then mutual assistance pact with the licensed officers union, District 2 MEBA, the SIU assisted in picketing activities of MEBA against Isbrandtsen Lines in support of a MEBA dispute with that company (App. E, para. 15(a); App. F, para. 13(b), 15(c), 15(d), 15(g)).

Cole admitted his knowledge of all of the foregoing facts prior to the August 1962 incident (88a-94a, 108a,

109a, 118a), which gave rise to the disciplinary charges filed against him resulting in his expulsion after notice to him and his participation in the union hearing.

At the August, 1962 membership meeting, Cole proposed, introduced and sought implementation of a resolution consisting of twelve preamble and four resolved clauses attacking the SIU's jurisdictional fights with the NMU and the mutual assistance pacts with the MEBA and support of its implementation (App. E, para. 16(e), para. 17). The resolution was defeated with only two members voting in favor, Cole and the member who seconded the resolution (App. E, para. 18(b)). Cole admitted that the purpose of his resolution, its object and end sought, for which he desired its implementation, was for the SIU and its membership not to contest the NMU in its raids against the SIU, notwithstanding no concomitant forebearing by the NMU, and further to terminate mutual assistance pacts with the licensed officers unions, the MEBA, notwithstanding his admission that the same was necessary to protect SIU membership jobs. Cole admitted that his conduct and end sought was a consequence of his philosophy, to wit, that as a member of the SIU he has two loyalties, one is to his union the SIU, the other to the union movement generally (192a). He further recognized and understood that his union, the SIU competes for jobs for its members, competes for a market against the NMU, just like a business competitor (130a). Further, he acknowledged that if it's advantageous to the SIU to obtain jobs that another union (NMU) has, or to protect SIU jobs against the NMU, it disadvantages the NMU. He further acknowledged that although raiding for jobs may result in benefit to the SIU and its membership it was contrary to his other loyalty to the union movement generally (129a). Consequently, consonant with his above philosophy and action sought for by his resolution, there should be no raiding by the SIU and participation in mu-

tual assistance pacts notwithstanding such activities preserve or secure jobs for the SIU, and notwithstanding that the NMU would continue to raid, as otherwise he felt, in the long run, SIU would suffer more in its reputation (131a). He further acknowledged that the SIU policies to preserve and secure jobs viza the NMU and maintain mutual assistance pacts with the officers unions, with SIU membership participation and support, was official union policy adopted by the SIU membership (142a, 143a).

On September 4, 1962, member DiGiorgio filed charges with the SIU against Cole alleging that Cole's conduct as exemplified by his proposed resolution (App. E, para. 16(e)) and sought for result at the August 6, 1962 membership meeting constituted a violation of SIU constitutional provisions.[2] The charges were based upon recitals in the Whereas clauses of the resolution (App. E, para. 20, 21). The September, 1962 membership meeting accepted the charges. A trial committee was elected to hear the charges and after notification Cole attended and participated in the hearing. The trial committee found Cole guilty as charged and recommended his expulsion and *inter*

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[2] SIU Constitution, Article XVI, Section 2, Paragraph (h):

"Deliberate and unauthorized interference, or deliberate or malicious vilification with regard to the execution of the duties of any office or job."

The charges filed against Cole, pursuant to such Article and Section read as follows:

a. Raiding a duly certified bargaining agent on contractual jurisdiction.

b. Moral arguments fabricated to justify SIU's interference in inter-union's beefs are both contradictory and phony.

c. Charges an Officer of this Union with the stealing of jobs from another union" (App. E, para. 19).

alia, made specific findings (162a, Defendant's Exhibit A, Exhibit T, 13 T 10 p. 2 and Exhibit 13 T 11 p. 2).[3]

The SIU membership thereafter accepted the trial committee's recommendations and Cole pursued the union constitutional appellate procedures. The findings of the trial committee were eventually affirmed (App. E, para. 24). Cole was advised that his expulsion would not however affect his right to and for employment through the union hiring hall (App. E, para. 25). Cole thereafter instituted this Section 102 proceeding.

The trial court concluded that Cole's conduct regarding his resolution, with his underlying philosophy and end sought, took place at a union meeting at which only union members were present, as such it was protected Section 101(a) activity. Furthermore, Section 101(a)(2)'s proviso, which permits labor organizations "to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution", did not apply to Cole's conduct even though such conduct,

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[3] As to Charge A:

"This situation was especially important to the membership because the jobs and security of 234 union men employed at that time on the Robin ships, which the SIU was seeking to protect, hung in the balance as a result of the beef. It naturally follows that when the beef jeopardized the jobs of 234 men on the Robin ships and consequently their livelihoods, it also jeopardized the job opportunities and security of all SIU men, because of the nature of employment and job security in the maritime industry."

As to Charge B:

"The record is very clear. The MEBA had a legitimate dispute with American Export whose vessels it was picketing in order to protect its members' jobs. The SIU supported and assisted the MEBA with the approval of the membership. This was not a novel instance of support because SIU and MEBA have a record of mutual assistance over the past years in many important disputes affecting the security and welfare of the membership of either one or both of the two unions."

brought about by Cole's underlying union philosophy, "* * * may as the union contends, * * * result in a decrease in the number of union jobs available, would reduce both the union membership and the treasury" (App. C).

The trial court however found, that as a result of his expulsion Cole sustained no damages, was afforded full employment opportunities by the union and any loss of employment was by virtue of his own preferences (App. E, para. 27(a)-(y), 28, 29, 30, 31). Further found, was that the SIU and its officers acted in good faith, believed that they had a right to charge and discipline Cole for his actions at the August, 1962 meeting (App. C). The trial court additionally found no malice on behalf of any of the defendants against Cole (App. E, para. 32(a), (b), App. C). Finally, the trial court did not find that Cole acted in good faith. On the contrary it was found that Cole's conduct was motivated by his political ambitions for office (App. E, para. 34). The trial court dismissed the action against the individual defendants (App. E, para. 33, and Conclusions of Law) and by mandatory injunction against the union directed it restore Cole to membership (App. E, Conclusions, para. 2).

With respect to Cole's request for attorney fees, the trial court concluded that although Section 102 was silent as to authority to award counsel fees to successful union members in Section 102 actions, it was persuaded by *Gartner* v. *Soloner*, 384 F.2d 348 (3 Cir. 1967), cert. den. 390 U.S. 1040, that such authority is present.

The trial court awarded Cole's counsel reasonable attorney's fees, to wit, $5,500 (App. D).

The Court of Appeals affirmed. In accord with the trial court, the Court of Appeals held that Cole's activity was protected under Section 101(a), having been engaged in and made at a union meeting and concerning union affairs. As to the issue of federal court's authority to

award counsel fees, the Court of Appeals, in accord with the Third Circuit's *Gartner* holding, *supra*, determined that Section 102's provisions authorizing district courts to grant "such relief (including injunctions) as may be appropriate", constitutes the necessary authority for federal courts to make an award of reasonable counsel fees in appropriate cases—finding the instant case such an appropriate instance.

Neither the trial court or the court of appeals, elaborated upon the concept of when an award is appropriate. No consideration was given to the specific court findings of defendant's good faith, absence of malice and failure to find plaintiff's good faith.

Reasons for Granting the Writ

I.

The court below in affirming an award of counsel fees in a successful Section 102 proceeding has exceeded its authority. By the affirmance, such court has perpetuated a conflict between circuit courts of appeal concerning the scope of remedy intended by Congress in Section 102 proceedings.

This case is one in which an unresolved conflict is perpetuated among Circuit Courts of Appeals as to whether or not Congress intended to and authorized federal courts to award reasonable counsel fees to union members, successful in Section 102 proceedings. Further, it is one in which standards applied by the trial and affirming court and other Circuit Courts, to determine the congressional intent embodied in Section 102 are contrary to standards applied by another Circuit Court and this Court. More important this case presents the fundamental issue as to the relationship of the federal courts to union disciplinary proceedings.

Pointedly stated, it presents the issue of whether federal courts, without express statutory authority, may nevertheless impose upon union treasuries extraordinary monetary awards, counsel fees, as a consequence of administration of disciplinary proceedings by unions in pursuit of the Congressional mandate to foster union self government. Such judicial imposition of substantial money assessments[4] will of necessity chill if not frustrate, the internal union self regulation which Congress was careful to preserve and further, weaken unions in their role as collective bargaining agents, which Congress sought to prevent in eacting the Labor Management Reporting and Disclosure Act[5] (73 Stat. 523, 29 USC Sec. 411 *et seq.*).

The impact of the imposition of counsel fee awards upon unions, is most substantial. It's consequences engulfs millions of union members throughout the country, their union treasuries, and thousands of labor organizations engaged in the day to day administration of union self government. Similarly, it is patent that such impact has adverse effects upon the legislative object of stability in collective bargaining relations. An integral part of such stability mandates a viable and meaningful union fulfilling its role in the collective bargaining process, not one beset with irresponsibility occasioned by untoward conduct of its constituency, left unredressed by virtue of the fear of substantial impact upon their treasury for extraordinary damage awards which may arise, as distinguished from compensatory damages for members loss of employment, brought about by virtue of an imperfection in the administration of self government. For as here, the union sought

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[4] It is to be noted that premising an award of counsel fees on Section 102's "such relief (including injunctions) as may be appropriate, may be equally applicable to awards for punitive and exemplary damages."

[5] *NLRB* v. *Allis Chalmers Manufacturing Co.*, 388 U.S. 175, 194; *Hodgson* v. *Local 6799 United Steelworkers of America*, 403 U.S. 333, 338.

to and did impose such discipline in a good faith effort to maintain its viability so as to fulfill its role as a meaningful collective bargaining agent for its seamen members, without impinging upon Cole's right to and for employment.[6] Yet, its treasury is now the source for payment of a substantial sum for counsel fees for Cole, who sustained no compensatory damages.

This Court, in *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U.S. 714 (1967) addressed itself to the issue of the authority of federal courts to make reasonable counsel fee awards to successful litigants, and after reviewing the history of counsel fee awards in the United States, concluded, "The rule here has long been that attorney fees are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefor". Id. at 717. As expressed by this Court, although there were exceptions to the general rule they, "were not developed in the context of statutory causes of action for which the legislature had prescribed intricate remedies". *Id.* at 719. This Court then concluded (at 721):

> "When a cause of action has been created by a statute which expressly provides the remedies for vindication of the cause, other remedies should not readily be implied. Philip v. Nock, 17 Wall. 460, 21 L. Ed. 679 (1873); Teese v. Huntingdon, 23 How. 2, 16 L. Ed. 479 (1860); cf. Day v. Woodworth, 13 How. 363, 14 L. Ed. 181 (1852). Congress has over-

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[6] As found by the trial court, *supra*, Cole's employment rights after his expulsion, remained inviolate and he sustained no damages concerning such rights (21a, 22a).

The trial court further found, *supra*, that the union and its officers in charging and disciplining member Cole, in good faith, believed they had a right to charge and discipline him and they acted without malice (33a), and did not find that Cole acted in good faith, but on the contrary, found that he was motivated by political ambitions for office.

Significantly, the affirming Court of Appeals in its opinion makes no mention of the foregoing crucial findings.

> turned the specific consequences of Philip and Teese by expressly allowing recovery of attorney's fees in patent cases and has selectively provided a similar remedy in connection with various other statutory causes of action. But several attempts to introduce such a provision into the Lanham Act have failed of enactment. We therefore must conclude that Congress intended § 35 of the Lanham Act to mark the boundaries of the power to award monetary relief in cases arising under the Act. A judicially created compensatory remedy in addition to the express statutory remedies is inappropriate in this context."

The Act at bar is without question a most complex and intricate statute whose scope regulates an extensive range of internal union affairs. Its specific remedies for the violation of the specific conduct regulated, are tailored and fashioned to the specifically created substantive rights and obligations. Title I, Sections 101(a)(1) through (5) covers rights and obligations affecting union members as to equal rights, freedom of speech and assembly, dues, initiation fees and assessments, protection of the right to sue and safeguards against improper disciplinary action. As to other Title I rights, its Section 103 provides for a member's retention of existing state and federal rights; Section 104, the right to copies of collective bargaining agreements and Section 105, the right to be informed by his union as to the provisions of the Act. Each of these varied, intricate and extensive rights are private rights enforceable by the member in a civil action in a federal district court pursuant to Section 102 for, "such relief (including injunctions) as may be appropriate". In addition to the aforesaid Section 102 remedies, a further remedy is provided for the violation of a member's right enunciated in Section 104, *supra*. Such remedy is enforceable by the Secretary of Labor pursuant to the Act's Section 210. As distinguished from other Titles and Sections of the Act, which specifically provide for award of counsel fees

as part of the remedy, no such provision is made applicable to Title I rights.

The Act's Title II, Sections 201-210, further demonstrates a most detailed and comprehensive scheme for the making and filing of reports by unions, their officers and employers, together with such reports being available for public information and the requirement of those obligated to file reports, to retain all records and documents in support. Title II's Section 201(c) requires unions to permit its members, for just cause, to examine all records in support of reports filed with the Secretary. In the enforcement of Title II provisions, in addition to criminal sanctions, the Secretary pursuant to Section 210, may institute a civil action, "for such relief (including injunctions) as may be appropriate". Such provision is identical to that contained in Section 102. Most significant, in addition to the foregoing remedies, a member has a private right of enforcement against his union for a violation of his rights provided for in Section 201(c), *supra*, similar to the private right of enforcement for violation of his Title I rights. However, with respect to proceedings to enforce his Section 201(c) right, Congress expressly provided that the federal court may in such proceeding, in its discretion, "in addition to any judgment awarded to the plaintiff * * *, allow a reasonable attorney's fee to be paid by the defendant and costs of the action". No such similar provision is contained in Title I's enforcement procedure, to wit, Section 102.

The Act's Title III Sections provide for labor organizations to file reports with the Secretary where a trusteeship has been imposed upon a subordinate body (Section 301); provides the purpose for which a trusteeship may be established (Section 302); and defines what conduct is unlawful as relating to a union under trusteeship (Section 303). Section 304 provides the remedy for the violation of Title III provisions, both by the Secretary and by a private suit

by a member. As to the remedy applicable to both—the language is identical to that of Sections 102 and 210, *supra*, to wit, "for such relief (including injunctions) as may be appropriate".

The Act's Title IV prescribes precise and extensive rules and regulations for the conduct of union elections with the exclusive right of the Secretary to investigate election complaints and institute proceedings, if warranted, in federal courts to set aside elections and to conduct reruns under his supervision. Notwithstanding the same, Section 609 provides that if a member is disciplined for exercising any rights provided for him in Title IV as well as pursuant to any other Title, the member may institute proceedings and the provisions of Section 102 shall be applicable. Again no expressed authority to federal courts to award reasonable attorney's fees.

The Act's Title V Section 501(a) and (b), establishes fiduciary responsibilities for officers of labor organizations. For violation of that obligation a member is provided with the right under Section 501(b) to institute proceedings "to recover damages or secure an accounting or other appropriate relief for the benefit of the labor organization". Further provision is expressly made for the allowance of attorney's fees. Title V contains other provisions not necessarily relevant but which again demonstrate the meticulous scheme Congress established as to the boundaries of its regulation and expressed relief for violation of such regulations.

Similarly, as to such Congressional detail and meticulous scheme, are the provisions of Title VI, with investigatory powers provided the Secretary; defining conduct deemed criminal and its Sections 609 enforcement authority incorporating the specific authority contained in Section 102, *supra*, where a member is disciplined for exercising, "any right to which he is entitled under the provisions of this Act."

The foregoing legislative scheme utilized by Congress makes clear that where Congress determined to provide authority for the recovery of attorney's fees, it had no hesitation in so expressly stating, as demonstrated by the Act's Sections 201(c) and 501(b) *supra.*

The legislative history, although relatively sparse on the issue of "relief (including injunctions) as may be appropriate" under Section 102, nevertheless, such history as is available demonstrates Congressional intent not to authorize attorney's fees under Section 102 provisions.

In the judicial search of legislative history, in the endeavor to gleam or determine the legislative intent, the primary weight should always be given to the views expressed by the sponsors of the bill. *National Woodwork Manufacturing Ass'n.* v. *N.L.R.B.*, 386 U.S. 612 (1967). It is unquestioned that the prime sponsors of the Act in the House, were Congressmen Landrum and Griffin. In fact, the Act is referred to as the Landrum-Griffin Act. Congressman Griffin, in referring to the Act's Section 609, which provides that Section 102's remedies shall be applicable—incorporates them, stated:

> "(c) Section 607 of the Senate-passed bill which provided criminal enforcement of rights guaranteed under the Act was stricken by the House committee. The substitute—in sections 609 and 610—restores the sense of the Senate provision but makes it clear that criminal sanctions apply only when rights are denied through the use of force or violence."

Leg. Hist. Vol. II, p. 1519, col. 3.[7]

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[7] The legislative history of the Labor Management Reporting & Disclosure Act, is reproduced in a two volume work published by the National Labor Relations Board and printed by the Government Printing Office. The notation "Leg. Hist." will indicate references to this work.

Thereafter Congressman Griffin in the Congressional debate, turning to a detailed analysis of the Act, stated:

> "Section 609 (denial of rights through discipline): The Senate-passed bill (S. 1555) contained a criminal enforcement provision (sec. 607) which was stricken out by the House committee. (Paragraph (a) of that section 607 would have made it a crime for any labor organization, or its agents, to fine suspend, expel, or otherwise discipline a member for exercising rights guaranteed by the act). The substitute bill provides that denial of such rights through union discipline shall be unlawful; however, unlike S. 1555, the substitute provides for civil, rather than criminal, enforcement. In our judgment, the conduct prohibited by this section is generally comparable to conduct described as an unfair labor practice under the Taft-Hartley Act and, accordingly, we do not believe that criminal sanctions are warranted." Leg. Hist. Vol. II p. 1522-col. 1.

The conduct which the Act's sponsors prohibited was in their judment comparable to unfair labor practices under the Taft-Hartley Act (29 USC Sec. 141 *et seq.*). By tracking the Act's prohibited conduct (other than those specifically made criminal) with unfair labor practices, by equating both, the Act's sponsors were setting forth the Congressional scheme as to the prohibited conduct and the comparable appropriate remedies. Certainly there cannot be imputed to the Act's sponsors an ignorance of the remedial provisions contained in the Taft-Hartley Act. Equally, in the light of the comparable conduct sought to be prohibited, unfair labor practices and rights of members established by the Act, there should not be found, absent expressed language to the contrary, a Congressional intent to prescribe substantially different remedies. On the contrary, the converse would be impelled—the same remedies. Taft-Hartley's remedial provisions provides that the NLRB:

> "* * * shall issue an order requiring such person to cease and desist from such unfair labor practice, and

> to take affirmative action including reinstatement of employees with or without back pay, as will effecuate the policies of this Act:" (Section 10(c))

Such NLRB remedy encompasses injunctive relief as well as monetary damages to the employee to the extent of his lost wages and does not permit of other monetary remedies. *Republic Steel Corp.* v. *NLRB*, 311 U.S. 7 (1940). Conduct comparable to unfair labor practices which the Act's sponsors sought to prohibit, implicitly carries with it the Congressional intent to apply comparable remedies absent expressed language to the contrary such as in Sections 201(c) and 501(b). And discipline by a union of a member, allegedly in violation of the exercise of Section 101(a)(2) rights of expression and conduct in support thereof is most comparable, if not the counterpart of employer discipline of an employee for exercise of his Section 7 rights provided in the Taft-Hartley Act and an unfair labor practice under Section 8(a)(3) of that Act.

The foregoing congressional intent to apply comparable remedies to comparable conduct which Congress sought to prohibit, becomes most manifest when further examination is made of Congressional remarks.

Senator Goldwater, an advocate of a bill more stringent than that eventually passed and now constituting the Act, directed his remarks as to what he considered weaknesses in the Act. Zeroing in on the remedy provided for violation of a member's rights guaranteed by the Act, he stated:

> "Although the bill permits the union member himself to sue for infringement of his rights, the nature of the suit is such as to promise, even if successful, little in the way of monetary damages except in the rare case where the plaintiff's job rights or job tenure have been adversely affected. Morever, the bill does not grant him, even where successful in his suit, reasonable counsel fees or other costs. It thus forces him to assume the entire financial burden of the litigation. For an ordinary rank-

and-file union member who is generally a wage worker, such a litigation thus becomes an impossible financial burden. In recognition of these difficulties, the Fair Labor Standards Act, for example, requiring the payment of minimum wages and premium overtime pay for certain categories of workers, permits not only the worker himself to bring a suit for non payment (which he may do in the State as well as the Federal courts) and to recover attorney's fees and court costs if successful, but if the worker prefers, he may have the Secretary of Labor bring such suit in his behalf. "Leg. Hist. Vol. II p. 1281—col. 1.

Similar to Senator Goldwater's remarks is the House Minority Report on the Act. H.R. Rep. No. 741, 86th Cong. 1st Sess. (1959), U. S. Code Cong. & Ad. News 1959, p. 2424:

> "One of the most serious inadequacies of the Senate bill is the lack of any effective enforcement procedure to protect union members from those few union officials who fail to recognize that a union belongs to its members. Under the bill the individual member must shoulder the burden of litigation costs himself. The union officer (sic), on the other hand, have the entire resources of the union at their disposal. This impractical enforcement method is weakened still further in the commttee bill."

The Act at bar originated with the reporting of the Kennedy-Ervin Bill to the Senate by the Committee on Labor and Public Welfare, in April, 1959. Leg. Hist. Vol. II, p. 1019 cols. 2, 3. Such bill however, did not contain provisions, euphemistically thereafter characterized as bill of rights. A few days thereafter Senator McClellan proposed an amendment to the Kennedy-Ervin bill, which provided for member's bill of rights. The enforcement Section of such amendment provided:

> "Sec. 102. Any officer or agent of any such labor organization who, through use or abuse of authority, or through failure to discharge the duties of his of-

fice, or otherwise, wilfully interferes with or prevents, or attempts to interfere with or prevent, the exercise by any member of a right to which such member is entitled under the provisions of section 101 shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

Sec. 103. The Secretary, whenever it shall appear that any person has violated or is about to violate any of the provisions of this title, may bring an action in a district court or other court of the United States for such relief as may be appropriate including, but without limitation, injunctions to restrain any such violations and to compel compliance with this title. Any such action against a labor organization may be brought in the United States District Court for the District of Columbia or in the district court or other court of the United States where the violation occurred or is about to occur." Leg. Hist. Vol. II, 1102, cols. 2, 3.

It is most significant to note that Section 103 of the McClellan amendment was the same language contained in the enforcement provisions provided for under Title II, Section 210 and Title III, Section 304(a).

Thereafter, serious concern was expressed as to the enforcement provisions of Section 102 in that bureaucratic chaos might result if the Secretary was required to initiate and process all complaints on behalf of union members. Leg. Hist. Vol. II, pp. 1111-1114. To dispel such fears, Senator Kuchel offered an amendment removing the Secretary of Labor as the sole person to seek relief in federal courts and instead gave that right directly to the aggrieved union member. The Kuchel amendment became the version ultimately adopted by the Senate, and states:

"Any person whose rights secured by the provisions of this title have been infringed may bring an action in a district court of the United States for such relief as may be appropriate. Any such action against a labor organization shall be brought in the United States district court for the district where

> the alleged violation occurred, or where the headquarters of such labor organization is located." Leg. Hist., Vol. II, p. 1221.

The only substantial alteration of the Kuchel amendment was the subsequent parenthetical insertion of the words "including injunctions", to insure that at least an injunction would be considered appropriate relief under the Act. *Gartner* v. *Soloner, supra,* at p. 350.

It is most apparent from the foregoing that at no time did Congress intend reasonable counsel fees awards to be authorized pursuant to Section 102. The legislative history aforesaid contains no authority for any conclusion which would authorize the award of attorney's fees. It is further clear that only the Secretary of Labor was contemplated to be the sole authority authorized to enforce the provisions and certainly it cannot be maintained or inferred that Congress intended the Secretary to be awarded attorney's fees, for, as noted, the Kuchel amendment was solely to remove the fears of bureaucratic chaos and nothing else. When Congress intends to allow recovery of attorney's fees in statutory actions, it has no difficulty in so expressly stating, as witness, *Fleischmann, supra,* at 721, fn. 17.

The foregoing concept is equally present in the Act at bar. For when Congress determined in the Act to authorize reasonable attorney's fees, it so specifically stated, as in the Act's Section 201(c) and 501(b). To imply a Congressional intent that the federal courts may award attorney's fees in Section 102 actions, absent specific authority in the Act, where other Sections of the same Act contain such specific authority, *supra,* would constitute an aborting of Congressional intent, and substitute a judicial judgment for a congressional judgment. Such conduct would expressly override accepted judicial doctrine utilized for finding the manifestations of Congressional intent, set forth so clearly in *Fleischmann* at 721, fn. 17, *supra.*

More than thirteen years has transpired since the Act's enactment. During that period District Courts and Circuit Courts of Appeals who passed upon the scope of Sections 102 and 609, are in substantial conflict as to whether such Sections authorize federal courts to award attorney's fees to successful litigant union members. The following cases and discussion demonstrates the serious conflict.

Courts which have determined that federal courts have no congressional authority to award attorney's fees in successful Section 102 and 609 proceedings.

In *McCraw* v. *United Association of Journeymen & Apprentices of the Plumbing, etc.*, 216 F. Supp. 655, 664, the District Court concluded that in a successful Section 102 proceeding, no authority is present for allowance of attorney's fees, concluding that, "The Legislative history of this statute * * * reflects that the bill was so interpreted at the time of its enactment", citing Senator Goldwater's remarks, *supra.*

Upon an appeal by the member from such decision denying attorney's fees, the Sixth Circuit Court of Appeals in *McCraw* v. *United Association of Journeymen & Apprentices of the Plumbing etc.*, 341 F. 2d 705, 710, (1965), affirmed the District Court's holding for the same reasons expressed by the lower court.

In *Gartner* v. *Saloner, supra,* the Third Circuit in a split decision, reversed the District Court's conclusion that Section 102 does not authorize federal courts to award attorney's fees to successful litigants. The majority decision in *Gartner* is discussed *infra.* The minority would have affirmed the District Court.

The minority's decision is premised upon this Court's expression in *Fleischmann, supra,* that ordinarily counsel fees are not recoverable as damages. In support, the minority cited the legislative history *supra,* of the Congres-

sional developments resulting in the enactment of the Act's Section 102. Commencing with the original Kennedy-Ervin bill in the Senate, and the amendment to such bill by Senator McClellan, it pointed out that in the McClellan amendment the sole authority to institute Section 102 proceedings was the Secretary of Labor. That the Kuchel amendment to the McClellan bill was adopted solely because of the concern that bureaucratic chaos might result if the Secretary of Labor was required to initiate all complaints. The minority concluded that the Secretary obviously would not be entitled to counsel fees and thus it would appear, that counsel fees were never intended by Congress to be authorized by Section 102's enforcement provision, to wit, "* * * such relief * * * as may be appropriate." Further in support of its conclusion the minority stated * * *, "indeed, all Congressional comment contained in the Legislative history is to the contrary", citing Senator Goldwater's remarks and the Minority House Report, *supra.*

District Courts who have concluded that there is no congressional authority for an award of counsel fees in Section 102 proceedings are *Vars* v. *International Brotherhood of Boilermakers,* 215 F. Supp. 943 (D.C. Conn. 1963), affirmed on that part of the judgment that restored membership rights, 320 F. 2d 576 (2 Cir. 1963), no appeal was perfected on denial of award of counsel fees as not being authorized; *Cole* v. *Hall,* 35 FRD 4 (D.C. E.D.N.Y. 1964), same case as at bar, constituting a court holding on a successful pre trial motion to dismiss the cause of action for attorney's fees, that same was not authorized,[9] *Bailey* v. *Netter* 266 F. Supp. 165 (D.C. E.D.La. 1967); *Jacques* v. *Local 1418 ILA, et al.,* 246 F. Supp. 857 (D.C. E.D. La. 1965); *Magelson* v. *Local Union No. 518,* 240 F. Supp. 259

[9] Upon trial of the case at bar, the court advised that after conversation with brother Judge and his consent, the court would reinstitute plaintiff's claim for an attorney's fee award and determine the same.

(W.D. Mo. 1965): *Leonard* v. *MIT Employees*, 225 F. Supp. 937 (D.C. Mass. 1964); and *Yablonski* v. *United Mine Workers*, 314 F. Supp. 616 (D.C., D.C. 1970).

In *Yablonksi*, *supra*, the member's action was commenced pursuant to the Act's Section 609 which incorporates Section 102's relief provisions, alleging *inter alia*, a violation of Title IV rights, constituting a denial of right to the use of mailing lists and union journal in a forthcoming union election, as well as for relief by virtue of alleged dismissal from union employment because of the exercise of rights protected by the Act. After review of the legislative history, *supra*, the District Court concluded that Congress did not authorize an award of counsel fees. Also cited as authority was *Fleischmann*, *supra*.

The *Yablonski* court further discussed *Mills* v. *Electric Auto Lite Co.*, 396 U.S. 375 (1970), as an exception to the *Fleischmann* rule, *supra*, holding the *Mills* determination however, not applicable to the Act at bar. The court demonstrated that *Mills* involved an "implied private right" as distinguished from the Act's specifically created Congressional rights, and the need to fashion relief for such implied private right, a task which Congress patently did not undertake to perform. Furthermore, the implied right in *Mills* was akin to the Act's Section 501(a) and (b) provisions—both actions of a derivitive nature, and specifically noted that under Section 501(b) Congress expressly provided for counsel fee award. It was further demonstrated that the Act at bar was comparable to the Lanham Act, present in *Fleischmann*, *supra*, in that each demonstrated a meticulous scheme of regulation with specific remedies tailored to each of the created rights and where Congress concluded that counsel fee awards were appropriate to a particular created right, it so expressly stated. Such Congressional careful, meticulous drafting and scheme was not present in *Mills*, where the right established was

an implied private right. Pinpointing the issue crucial to the determination, the court stated:

> "As noted, supra, in only two instances does the LMRDA provide for the award of attorney's fees, i.e., in actions arising under §§ 201 (c) and 501 (a), and none of the cases here under discussion can be said to clearly fall within the scope of these two specific sections. In the language of *Fleischmann*, those sections "mark the boundaries of the power to award monetary relief" in cases arising under the LMRDA. Congress had the opportunity to extend this remedy beyond the two specific provisions but chose not to do so. To now award fees in these cases the Court would have to ignore the clear Congressional intent and carve out an implied remedy that attorney's fees are available for a violation of any section of LMRDA. The Court is not at this time inclined to so rule." Id. at 619.

Courts which have determined that federal courts have congressional authority to award attorney's fees in successful Section 102 and 609 proceedings.

The lead case cited by other courts, which have concluded that Congress authorized attorney fees awards in Sections 102 and 609 proceedings is the Third Circuit's *Gartner* holding, *supra.*

The *Gartner* majority at the outset recognized that the only circuit court which had to then passed upon the instant issue of attorney's fees awards in Section 102 proceedings, was the Sixth Circuit in *McCraw, supra.* With respect to the same the *Gartner* majority stated:

> "On appeal the Sixth Court affirmed the District Judge's finding" * * * that no provision is made for the allowance of attorney's fees in an action under Section 101 or 102 of the Act.* * *." *McCraw* v. *United Ass'n of Journey, & App. of Plumbing,* 341 F. 2d 705, 710 (6 Cir. 1965). Id. 350.

The Court majority rejected the remarks contained in the Minority House Report, *supra,* as well as those of Senator Goldwater, *supra,* noting that, neither of those communications were voiced as part of the floor debate on the Act in either the House or Senate, Id. 351, footnoting their (the court's) comments. The majority consequently characterised such report and remarks not appropriately legislative history to discern the Congressional intent. We respectfully submit that such conclusion is erroneous and constitutes an unfounded precept. The majority then cited the comments of Congressmen Elliott and O'Hara.[10] Concluding, in accordance with *National Woodwork, supra,* "* * * primary concern should always be given to the views expressed by the sponsors of the bill and in this respect the statements of Senator McClellan and Rep. Elliott should be looked to as representing the true spirit of Section 102." It. 353.

However, as the majority notes, the Elliott bill was rejected and the bill eventually passed by the House was the Landrum-Griffin bill. The majority's error is in its failure to observe its own rule, to wit, to look to the comments of the sponsors of the Landrum-Griffin bill as representing the true spirit of Section 102. For as we have demonstrated, *supra,* Representative Griffin's views furnish no basis to conclude that there is Congressional authority for award of attorney's fees. On the contrary, the conduct sought remedied was comparable to Taft-Hartley unfair labor practices and consequently intent for comparable remedies. Similarly, as to the statements of Senator McClellan as representing the true spirit of Section 102. As the *Gartner* minority *supra* expressed, in

[10] The majority's citation of Representative O'Hara's comments at p. 353, failed to state that such were made in support of the rejected Elliott bill. Leg. Hist. Vol. II 1633, col. 1, and made at a time that the Landrum-Griffin bill was before the House: See Rep. Griffin statements, Leg. Hist. Vol. II, pp. 1519, 1522. Id. 352, 353.

accord with the majority, and as our discussion of Senator McClellan's amendment equally expressed, the Senator's amendment constituted no rational basis to conclude that attorney fees were authorized. On the contrary, it's relief provisions, limited to their exercise by the Secretary of Labor, compels the conclusion that attorney's fees were never intended or authorized. To conclude otherwise, would mandate that Congress authorized the courts to award attorney's fees to the Secretary of Labor, a result most far fetched, if not inconceivable. Similarly, the majority's reliance upon *Johnson* v. *Nelson,* 325 F. 2d 648 (8th Cir. 1963), is inappropriate. *Johnson* was a proceeding pursuant to the Act's Section 501(a) and (b) where Congress expressly authorized the award of counsel fees. The *Johnson* court's comments as to Section 102, not relative or necessary to their determination, sans exhaustive study, review and analysis of the legislative history, and made prior to the *Fleischmann* holding, *supra,* is at the best purely gratuitous dicta.

The *Gartner* majority, apparently in an endeavor to explain away Congress' failure to expressly provide authority for attorney fee awards, held that it was because of:

> "* * * in the heavy presure atmosphere attending the creation of the Labor Management bill of rights legislation there was a manifest reluctance to specifically detail the individual's right to reimbursement for counsel fees expended in defeating his union's effort to deprive him of his fundamental rights as a member. Nevertheless, the Congress was successful in protecting that right by giving such union member "appropriate relief". That phrase, while it avoided spotlighting the making available of necessary material assistance to a single unionist fighting his lonely battle for justice, did take care of the situation by means of the deliberately general language used. In the clear light of the latter, if the Congress had concluded to reverse its field and tear up the bill.

> of rights it had drafted, it would have stated that there would be no counsel fees allowed. Absent this, "appropriate relief" fairly construed must be held to include proper counsel fees." Id. 355.

It is most respectfully submitted that the foregoing does not demonstrate a search for legislative intent. It is, we respectfully submit, an interpretation premised upon conjecture, not a judicial search for the requisite intent of Congress. The court's opinion first creates a "heavy pressure atmosphere" without explication upon such phrase. It then attributes to Congress "a manifest reluctance to specifically detail an individual's right to reimbursement for counsel fees* * *." If further attributes to Congress the utilization of the term "appropriate relief", as the authority for attorney's fees award, in order to "avoid spotlighting". Why such heavy pressure atmosphere, reluctance and spotlight avoidance did not preclude Congress from expressly authorizing attorney fee awards in other Section as demonstrated *supra,* is never explained. Most significant is Section 609. It provides that Section 102's enforcement provisions shall be applicable to it in enforcement proceedings to remedy a violation of a member's right under any provisions of the Act. It is not limited to the bill of rights legislation. Yet, by the court's holding, premised upon "heavy pressure atmosphere", attorney fee awards by virtue of Section 609 are applicable to remedying all rights, not solely those set forth in the bill of rights, concerning which, the court concludes such, "heavy pressure atmosphere" was only applicable.

We again most respectfully submit, that the acceptance of such criteria, the utilization of such nebulous, ephemeral and subjective standards for judicially determining Congressional intent, would render the task impossible of objective performance. It would be contrary to the criteria and long established doctrine set forth in *Fleischmann,*

supra. Such conduct, if authorized, would judicially usurp functions of Congress.

In addition to the Third Circuit's holding in *Gartner*, the Fifth Circuit has recently also passed upon the same issue. In *Burch* v. *International Assn. of Machinists*, 454, F. 2d 1170 (1972), the Fifth Circuit, in a per curiam decision held:

> "The judgment of the district court, 337 F. Supp. 303 is affirmed. See Local Rule 21. That court's finding that the termination of Burch's membership was arbitrary and discriminatory is not clearly erroneous. Moreover, the district court properly construed the "appropriate relief" provision of the Landrum-Griffin Act to permit the award of attorney's fees in this case. 29 U.S.C. § 412; *Gartner* v. *Soloner*, 3 Cir. 1967, 384 F. 2d 348, cert. den'd 390 U.S. 1040, 88 S.Ct. 1633, 20 L. Ed. 2d 302."

The Second Circuit in the case at bar, affirmed in part upon the *Gartner* authority, *supra*,[11] perpetuating the conflict among and between the courts. As to the application of the *Fleischmann* holding, and the fact that Congress expressly authorized attorney fee awards in some Sections of the Act and not others, the court characterized it as a "non sequitur here", stating:

> "These sections have to do with narrowly defined remedies such as the examination of books and records and an accounting. Here the relief necessary cannot be as easily foreseen nor broadly specified which accounts for the unlimited language of the Congress in § 102 i.e. 'such relief as may be appropriate'." Id. 781.

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[11] The court concluded that the Sixth Circuit's *McCraw* holding is not contrary to *Gartner*, although oft so cited, as an examination of that case "reflects that the court * * * did not specifically pass on Section 102, but instead considered Section 431(c) Id. 780. We respectfully submit that the court is in error. *Gartner, supra,* expressly states otherwise and so does a close reading of *McCraw.*

Sections 101(a)(3) and 401(c), to cite a few, equally have to do with narrowly defined remedies such as not having dues and assessments increased without a secret ballot; the right to inspect membership lists and for campaign literature to be mailed at a member's expense. Yet Congress did not provide for attorney fee awards there as they did for remedies under Section 201(c) and 501(b). No explanation is proferred by the Second Circuit of Congress' different remedy treatment for these same narrowly defined remedies.

Interpreting the Act, in the manner performed by the Second Circuit, *supra*,[12] is contrary to the Act's legislative history and to the historic doctrine here in the United States relative to award of counsel fees in statutory causes of action, expressed in *Fleischmann, supra.*

Some of the District Court holdings in accord with the *Gartner* majority are *Sands* v. *Abelli,* 290 F. Supp. 677 (SDNY 1968) and *Robins* v. *Schonfeld,* 326 F. Supp. 525 (SDNY 1971).

It is now more than 13 years since the Landrum-Griffin Act has been in effect. As demonstrated by the discussion of the cases, *supra,* both District Courts and Circuit Courts of Appeals who have passed upon the scope of Section 102

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[12] The court notes that plaintiff's counsel was "largely on a pro bono publico basis". Id. 780. The record demonstrates, on counsel's own admission, that counsel was assigned Civil Liberties Union counsel whose services were gratis (4a-6a). As to the Court's comments that Cole's preliminary injunctive relief required six months "largely because of the dilatory action of the union and its officers", Id. 780—there is no support in the record, let alone evidence to justify such statements.

Significantly, and most unusual, the court fails to discuss, take notice or even mention the trial court's findings, *supra*, that the union and its officers acted in good faith, without malice and the court's failure to find that Cole's conduct was not in good faith, but on the contrary, found his conduct motivated in part by political ambitions for office.

and 609 are in substantial conflict as to whether such Sections authorize federal courts to award attorney fees to successful union member litigants.

In the interest of sound administration of the Act, decisional uniformity, the millions of trade union citizens, their thousands of labor organizations and finally in the interest of national labor policy which Congress expressed in the Act, the foregoing issue with its attendant conflicts is now ripe for this Court's resolution.

II.

Counsel fees are not awardable in suits against unions under Section 102 for violation of members Section 101(a) rights where the union acts in good faith or without malice. Nor are such fees awardable unless the suing member is found to have acted in good faith.

The question as to whether counsel fees are awardable in an action under Section 102 where there is no finding that a suing member acted in good faith, or a finding that the union acted in good faith or without malice, is an important statutory issue, as to which lower federal courts are in conflict.

This Court has demonstrated its concern in a variety of contexts that monetary awards against unions be drawn with great caution. *Linn* v. *United Plant Guard Workers*, 383 U.S. 53; *Vaca* v. *Sipes*, 386 U.S. 171; *Teamsters Local 20* v. *Morton*, 377 U.S. 252.

Congress, in enacting Title I did not intend to place in jeopardy the financial status of unions as institutions by having them constitute the source for fees for attorneys. Congress did not in its remotest intention contemplate that union treasuries should be equated with corporate treas-

uries as the source for fees for attorneys, such as in derivative stockholders actions. The financial and consequential adverse impact which such suits and their encouragement may have upon unions, their ability to operate as effective collective bargaining agents, and in the interests of industrial stability, as intended by Congress, is most apparent. Congress has further recognized the importance of not allowing monetary awards against unions to defeat the needs of national labor policy and the need for financially secure unions to effectuate such policy. *Linn, supra.*

In enacting Title I, Congress intended "to create limits on the exercise of union authority without vitiating a labor organization's essential strength."[13] An examination of the cases, *supra,* where courts awarded attorney's fees in Section 102 proceedings, demonstrates their holdings to be inconsistent with the foregoing Congressional policies, as well as conflicts among them, as to the standards to be applied.

The Third Circuit's majority in *Gartner, supra,* requires as a condition precedent to the exercise of the court's discretion to award attorney fees, that there be a finding that the suing member acted in good faith. Nothing further is required.

The Fifth Circuit in *Burch, supra,* and the District Court in *Sands, supra,* follow the *Gartner* requirement of the finding of plaintiff member's good faith. In addition, *Burch* and *Sands* require the additional finding that the union's conduct be either "arbitrary or discriminatory", or "malicious", as a further prerequisite for exercising discretion to award counsel fees as a proper remedy.

Robins, supra, following the *Gartner* majority, and presumably although not stating, the prerequisite to the exer-

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[13] Christensen, Union Discipline, under Federal Law: Institutional Dilemmas in an Industrial Democracy, 43 NYUL. Rev. 227, 278 (1968).

cise of discretion, that there be a finding of plaintiff's good faith, would award counsel fees if the action and remedy benefited the union and the members as a whole. It does not require as a condition of the exercise of discretion, a finding of either arbitrariness or discrimination or malice by the defendant union.

At bar, both the District Court and the Second Circuit in citing *Gartner* authority, initially appear to follow the Third Circuit's *Gartner* decision, with its requisite finding of plaintiff's good faith. However, the District Court made no such finding of plaintiff's good faith as in *Gartner*. On the contrary, it found plaintiff's conduct motivated in part by ambition for political office. And notwithstanding the findings at bar, that defendants and their officers, "in good faith, believed they had a right to so charge and discipline plaintiff for his actions", and the further finding of the absence of "a showing of (defendants) malice", nevertheless the court gave no consideration to such findings in exercising its discretion to award attorney's fees. The Second Circuit affirmed the trial court without consideration or mention of such essential findings of defendant's good faith and the absence of malice as well as no finding of plaintiff's good faith.

This Court, in *Vaca, supra*, made clear in a union member's non statutory action against his union for its failure to properly represent him (a breach of a member's right), that as to the liability of a union, before its member's monies may be the source for monetary awards, the suing member must first demonstrate his good faith and it be so found and that it be further found that the union failed to act in good faith not alone negligent, or that the union acted maliciously toward him.

The inconsistent and conflicting decisions of the courts, supra, which have awarded attorney's fees or affirmed such awards, have clearly over-stepped the foregoing *Vaca* limits. Absent resolution of such conflicts and requisite

observance of expressed national labor policy, such determinations frustrate and obstruct such policy and warrants this Court's direction for adherence to the concepts embodied in such policy.

III.

A union member's exercise of Section 101(a)(2) rights at union meetings, are subject to his observance of union adopted reasonable rules as to every member's responsibility to the union as an institution and for violation of such rules the union may charge and discipline the member.

The holding in this case, in the circumstances present, that a union member at a union meeting exercising Section 101(a)(2), free speech rights which threatened legitimate union interests as an institution, is nevertheless protected from disciplinary proceedings, raises an important issue in the construction and application of the Labor-Management Reporting and Disclosure Act, most significant in the administration of that statute.

Congress in creating Section 101(a)(2) federal rights for union members, simultaneously conditioned the extent and exercise of such rights, by the proviso contained in such Section, that such rights were subject to the union's right to adopt and enforce reasonable rules as to the responsibility of every member toward the (union) organization as an institution and to refraining from conduct that would interfere with its performance of its legal or contractual obligations. It is clear that the federal rights granted were not absolute. The rights so granted and their exercise were qualified to the extent that the member possessed no such federal right if in it's exercise he impinged upon or violated reasonable rules adopted by the union as to his and every other member's responsibility

toward the union as an institution. As such the legislation represents a classic example of a right and its exercise which must however be accommodated to a more paramount right.

The Congressional debate is devoid of any significant discussion concerning the foregoing proviso. However, a Senate Report, as found by this Court, furnishes the necessary elucidation as to Congress's general objectives which encompass the foregoing federal established rights, their qualification and accommodation.

In *Hodgson* v. *Local 6799 United Steelworkers of America, supra,* this Court at p. 338 stated:

> "• • • The introduction to the Senate report accompanying the Act summarizes the general objectives of Congress:
>
> A strong independent labor movement is a vital part of American institutions. The shocking abuses revealed by recent investigations have been confined to a few unions. The overwhelming majority are honestly and democractically run. In providing remedies for existing evils the Senate should be careful neither to undermine self government within the labor movement nor to weaken unions in their role as the bargaining representatives of employees." S. Rep. No. 187, 86th Cong. 1st Sess., 5 (1959). U.S. Code Cong. & Admin. News, p. 2322.

The foregoing reinforces the conclusion that in administering the Act, courts must not tip the balancing which Congress intended to achieve. They must not give rigid observance to one of the many Congressional objectives, to the disregard of another Congressional objective or objectives. Of necessity there must be a balancing and accommodation of rights. Congress recognized that the overwhelming majority (unions) "are honestly and democratically run" and that the abuses were "confined to a few unions." In creating union member federal rights and remedies by reason of such abuses, Congress was careful

and so expressed its purpose, not to undermine the Congressional approved national labor policy of self government within the labor movement, nor "to weaken unions in their role as the bargaining representative of employees". And when Congress talks about "self government within the labor movement", it refers to and encompasses the internal operation of unions, who too, have their own jargon, and their own understanding of their daily problems and the concepts that their internal "laws" comprehend.[14]

Congress has placed the administration and implementation of the Act into the hands of federal courts. Charged with that responsibility, federal courts should give strict observance to the expressed Congressional purposes and enter upon the field, make the necessary balancing and accommodation of rights within the boundaries set by Congress, so that Congressional objectives and national labor policy is brought to fruition. The foregoing undertaking is not novel. Federal courts are not strangers to such tasks. They have consistently been called upon by Congress for review of conduct partaking of daily activities within the framework of national labor policy, to examine and review such activities within the aforesaid boundaries set by Congress.[15]

With respect to Section 101(a)(2) members' rights and the union institutional right expressed in the proviso and as further expressed in the aforesaid Senate report, appropriate accommodation of members' rights to such institutional right is the Congressional intent. It requires that federal courts subject to the "some evidence" test established in *International Brotherhood of Boilermakers* v.

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[14] *United Steelworkers* v. *Warrior & Gulf Navig. Co.*, 363 U.S. 574; *United Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564; *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593.

[15] Taft-Hartley Act, 29 U.S.C. 141 *et seq.*, Sections 10, 301 and 303; Fair Labor Standards Act, 29 U.S.C. 201 *et seq.*

Hardeman, 401 U.S. 233, in reviewing a union self government disciplinary proceeding in a Section 102 proceeding, to undertake the examination as to whether there was "some evidence" before the union trial body, that the exercise of the member's right interfered with, frustrated, conflicted with or otherwise threatened a reasonable union adopted rule to protect or preserve the union as an institution. And if there is such "some evidence", that the exercise of the member's right would bring about such result, then absent some other basis for review and decision, the discipline imposed should not be disturbed.[16] For Congress by the aforesaid proviso made clear, that Section 101(a)(2) member's right is required to be accommodated to the institution's right provided for in the proviso.[17]

The Union trial body found *inter alia*, that the plaintiff's conduct "jeopardized the jobs of 234 men on the Robin ships * * * and the job opportunities and security of all SIU men, because of the nature of employment and job security in the maritime industry", and further found " * * * SIU and MEBA have a record of mutual assistance over the past years * * * affecting the security and welfare of the membership of either one or both of the two unions" (fn. 3, *supra*). Additionally, the Trial Court found that the plaintiff had full knowledge of maritime union problems, the rivalries, jurisdictional disputes and fight for jobs. Plaintiff's conduct was knowledgeable and based upon

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[16] It is to be noted that the trial court found unnecessary, because of the result it reached, not to pass upon the alleged Section 101(a)(5) due process violation. Such issue was consequently not before the Court of Appeals or present in this petition.

[17] As this court further held in *Hardeman*, *supra*, federal courts in their review, such as at bar, should not undertake to construe the written union rule under which the member was charged, "to determine whether particular conduct falls within or without (its) scope." Id. 243. At bar plaintiff knew the conduct for which he was charged and its threat to the union. His defense was free speech protected under Section 101(a)(2).

all of the surrounding facts and circumstances, the union tribunal found that plaintiff violated his obligation of "responsibility toward the organization (union) as an institution".

The Trial Court recognized that the union tribunal's conclusion may be correct as witness its opinion that; "it may be, as the union contends, that the plaintiff's underlying union philosophy would result in a decrease in the number of union jobs available, would reduce both the union membership and the treasury" (App. C). The Court of Appeals further recognized possible basis for the union tribunal's conclusion, although first characterizing it as "speculative", then continued, "even if (it) had threatened legitimate interests of the union". Id. 779.[18]

The courts below did not make the review required by Congress and this court.[19] Both courts below found it unnecessary to undertake the performance of the "some evidence" test. Both courts concluded, that the plaintiff's exercise of his free speech Section 101(a)(2) right, at a union meeting, concerning union affairs was *per se* protected. The courts concluded that the exercise of such right negates any necessity to undertake any further review. Nothing further need be found. As such they vitiated the proviso.

The trial court interpreting Section 101(a)(2), and the Congressional intent and based upon *Salzhandler* v. *Caputo*, 316 F.2d 445 (2 Cir.) cert. den. 375 U.S. 943 and *Giordani* v. *Upholsters International Union of North America*, 403

[18] Apparently the Court of Appeals did not consider the *Hardeman* "some evidence" rule and the limited court's role in Section 102 proceedings as well as the rule prohibiting the substitution of the court's judgment for that of the union tribunal.

[19] A review of the surrounding facts and circumstance, no matter how difficult the task, in the search for "some evidence" before the union tribunal. *National Woodwork, supra, Hardeman, supra.*

F.2d 85 (2 Cir.)[20] authority, stated; "Where a member, however, presents charges in an orderly fashion at a regular union meeting, such speech falls clearly within the protected area" (App. C). Similarly the Court of Appeals held; "Moreover, even if Cole's resolution had threatened legitimate interests of the union, Congress had struck the balance of interests in favor of protecting the democratic process within unions by insuring freedom for every union member to enter into debate on union activities". Id. 779.

The courts below, by the foregoing process have failed to observe and adhere to the Congressional intent, supra. They have judicially concluded that "Congress has struck the balance of member's rights, viza union institutional rights, in favor of the former." Such interpretation, we respectfully submit does not accord with Congress's expressed intent that:

> "In providing remedies for existing evils the Senate should be careful neither to undermine self government within the labor movement nor to weaken unions in their role as the bargaining representative of employees." *Hodgson, supra,* at 338.

Equally significant, the aforesaid interpretation frustrates and precludes the Congressional instruction demonstrated by Section 101(a)(2)'s proviso, of accommodating a member's right to a reasonable adopted union rule of the responsibility of the member toward the union as an institution. Such error is more so compounded, when the member's conduct is knowledgeable and its adverse consequences upon the union under all of the surrounding facts and circumstances, is readily foreseeable, such as at bar.

The foregoing Court of Appeals holding in the light of the expressed Congressional intent as to the Act's purpose,

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[20] It is to be noted that the union discipline was not imposed for libel or slander, but for plaintiff's conduct constituting a threat to the union (its job opportunities), as an institution (fn. 3 *supra*).

warrants that this issue be passed upon by this Court. It is a fundamental issue which goes to the very foundation of maintaining sound union self government consistent with Congress' intent. It involves and affects a long established and substantial segment of our society—the trade union movement.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

By: /s/ Howard Schulman

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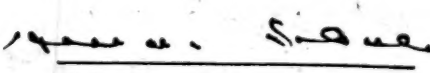
Certificate of Service

I, HOWARD SCHULMAN, Attorney for Paul Hall, et al, do hereby certify that on this 20th day of October, 1972, copies of the foregoing petition for writ of certiorari have been served on the attorney for John J. Cole,

Burton H. Hall,
401 Broadway,
New York, New York 10003

by mailing the same to him through the United States Mail, postage prepaid.



HOWARD SCHULMAN

Appendix A

(Statutory Provisions Involved)

LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT: SECTIONS 101(a)(2) AND 102

The pertinent provisions of the Labor-Management Reporting and Disclosure Act, 73 Stat. 523, 29 U.S.C. §§ 411 et seq., are as follows:

Section 101(a)(2), 29 U.S.C. § 411(a)(2), provides:

> "(2) FREEDOM OF SPEECH AND ASSEMBLY.—Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: Provided, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations."

Section 102, 29 U.S.C. § 412, provides:

> "Any person whose rights secured by the provisions of this title have been infringed by any violation of this title may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be brought in the district court of the United States for the district where the alleged violation occurred, or where the principal office of such labor organization is located."

Appendix B

(Court of Appeals Opinion)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 615—September Term, 1971.

(Argued April 7, 1972 Decided June 22, 1972.)

Docket No. 72-1003

JOHN J. COLE,

Plaintiff-Appellee,

v.

PAUL HALL, individually and as President or AL KERR, as Secretary-Treasurer, or EARL SHEPARD, as Vice-President, or CAL TANNER, as Executive Vice-President of SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA—ATLANTIC, GULF, LAKES AND INLAND WATERS DISTRICT,

Defendants-Appellants.

Before:

CLARK, *Associate Justice*,*

LUMBARD, *Circuit Judge*, and TYLER, *District Judge*.**

Appeal from an order of the Eastern District of New York, Jacob Mishler, *CJ*, granting Appellee reinstatement in Appellant union and attorneys' fees.

Affirmed.

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* United States Supreme Court, Retired, sitting by designation.

** United States District Court for the Southern District of New York, sitting by designation.

Appendix B

BURTON H. HALL, 401 Broadway, New York, *for Plaintiff-Appellee.*

SCHULMAN, ABARBANEL, PERKEL & McEVOY, New York (Howard Schulman, of Counsel), *for Defendants-Appellants.*

MR. JUSTICE CLARK:

This case was here during the September Term, 1964, on an appeal from an order enjoining the defendants pendente lite from excluding appellee, John J. Cole, from membership in the Seafarers International Union of North America. *Cole* v. *Hall*, 339 F. 2d 881 (1965). In a unanimous opinion by Chief Judge Lumbard, the panel [Lumbard, *CJ.*, Hays and Marshall, *Circuit Judges*] affirmed the judgment of the District Court restoring Cole to union membership after he had been expelled in violation of his rights under § 101 (a) of the Labor-Management Reporting and Disclosure Act [1] of 1959, 29 U.S.C. § 411 (a). Judge Dooling had entered the temporary order in the District Court on the basis that the defendants had in-

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[1] § 411.(a)(2). Freedom of speech and assembly.

Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings; Provided, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

fringed Cole's rights under § 101 (a)(2) of the Act. In addition, he found that they had also violated § 101 (a)(5) of the Act which requires a union to give adequate notice and a fair hearing to a member before disciplining him. Five years later the case came on for trial before Judge Mishler which resulted in a judgment ordering Cole permanently reinstated to membership in the union and restored to all of the financial benefits accruing to such membership and denying Cole's damage claims but granting him counsel fees in the sum of $5500 [the amount being stipulated] against the union. The complaint was dismissed against each of the individual defendants.

1. Appellant union first asserts that the trial before Judge Mishler adduced different facts than did the hearing for a temporary injunction. However a reading of the findings clearly shows that the trial judge based the judgment against the union substantially on the same grounds upon which Judge Dooling had issued the injunction in 1964 and this court had affirmed. There was additional evidence as to "raiding" engaged in by the competing unions in which the appellant union asserted it was in a "life and death" struggle for survival and that Cole's resolution would seriously undermine its chief function i. e. gaining and retaining jobs for members. The Trial Committee of the union had found that his resolution had threatened the union as an institution by jeopardizing 200 union jobs and recommended the expulsion of Cole. It claimed that the expulsion of Cole was therefore proper under the proviso of Section 101 (a)(1) permitting a union to "adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution." However, a reading of the opinion here and the later one of Judge Mishler shows that both are based on substantially the same grounds. As this court held, Cole was not subject to expulsion even though his

resolution was held by the Trial Committee to be "malicious vilification" or for that matter, false or libelous as this court pointed out, citing *Salzhandler* v. *Caputo*, 316 F. 2d 445 (2 Cir. 1963). Moreover, the argument appellant makes now is virtually identical to that rejected in *Giordani* v. *Upholsterers International Union*, 403 F. 2d 85 (2 Cir. 1968) and *Farowitz* v. *Associated Musicians*, 330 F. 2d 999 (2 Cir. 1964). This threat was speculative at best. Moreover, even if Cole's resolution had threatened legitimate interests of the union, Congress has struck the balance of interests in favor of protecting the democratic process within unions by insuring freedom for every union member to enter into debate on union activities. Cole was merely expressing his views on current union policy and urging other members to change that policy by adopting his resolution. He urged no individual member to violate union rules or to take any action not approved by the union membership. See *Farowitz* v. *Associated Musicians, supra*, at 1002. Under these circumstances, then, it is manifestly clear that Cole's conduct was protected. "The basic concern of the statute protecting union members' right to free speech is not in the precise words said, but rather what was being talked about. If the underlying topic of conversation concerns union affairs, then arguments, questions or accusations relating thereto are protected." *Giordani* v. *Upholsterers International Union, supra*, at 89, quoting from *Nix* v. *Fulton Lodge No. 2*, 262 F. Supp. 1000, 1005 (N.D. Ga. 1967). For, "[i]f unions could discipline such speech on the ground that it weakened their power as an institution, this safeguard would be rendered entirely ephemeral and ineffectual." *Giordani, supra* at 89-90.

2. The union also challenges the award of counsel fees. The trial judge in a most comprehensive and persuasive opinion upheld this award on the authority of *Gartner* v.

Soloner, 384 F. 2d 348 (3 Cir. 1967). As he points out Section 102 of the Act [29 U.S.C. 412] is silent on the question while Section 201 [29 U.S.C. 431] and Section 501 (b) [29 U.S.C. 501 (b)] specifically provide for the discretionary award of counsel fees. However, the provisions of Section 102, entitled "Civil Enforcement" do authorize the district court to grant "such relief (including injunctions) as may be appropriate." While counsel fees are not ordinarily recoverable in the absence of statutory or contractual authority, *Fleischmann Corp.* v. *Maier Brewing Co.*, 386 U.S. 714, 717 (1967), still three Circuits have upheld the discretionary award of counsel fees in Section 102 cases.[2] There are no decisions in any of the Circuits to the contrary, although *McCraw* v. *United Association*, 341 F.2d 705 (6 Cir. 1965) is sometimes cited as so holding. However, a close examination of that case reflects that the Court of Appeals did not specifically pass on § 102 but considered instead § 431 (c). At p. 711. In *Vars* v. *Boilermakers*, 215 F. Supp. 943 (D. Conn. 1963), counsel fees were not allowed. No appeal was perfected on this point; however, this court on the appeal of the union did affirm that part of the judgment restoring membership rights. In the district courts there are some conflicts, as has been noted; however the majority, including the Southern and Eastern[3] Districts of New York, have awarded counsel fees under § 102. To us the granting of counsel fees here makes sense.

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[2] *Burch* v. *International Association of Machinists and Aerospace Workers, AFL-CIO*, 454 F. 2d 1170 (5 Cir. 1971); *Gartner* v. *Soloner*, 384 F. 2d 348 (3 Cir. 1967); *Johnson* v. *Nelson*, 325 F. 2d 646 (8 Cir. 1963).

[3] The union points to the action of Judge Bartels in granting its motion to strike the counsel fee claim in Cole's complaint as creating a split in the Eastern District. See 35 FRD 4 E.D.N.Y. (1964). We think not. The record indicates that Judge Mishler, after speaking to Judge Bartels, granted counsel fees. In central calendar districts such situations often happen, and the final ruling is considered the law of the case. No ruling is taken as final until the final judgment is entered.

Appendix B

We start with the proposition that the Act clearly protects the right of members of labor unions "to meet and assemble freely with other members; and to express any views, arguments, or opinions, and to express at meetings of the labor organization his views . . . upon any business properly before the meeting . . ." Cole was exercising this very right and was expelled for it. This case—as well as a host of others—attests to the unions' propensity to deprive members of their rights of free speech. The Congress recognized this right as vital to the independence of the membership and the effective and fair operation of the union as the representative of its membership. When Cole brought this suit, he was not vindicating his rights of free speech alone but those of every member of the union as well. Indeed, his success in maintaining this right at union meetings inured to the benefit of union members everywhere. This action by Cole was therefore of substantial benefit to all of the members of the union. In vindicating his right, he vindicated their right. *Johnson* v. *Nelson*, 325 F. 2d 646, 653 (8 Cir. 1963). All Cole was fighting to correct and change was a policy of the union, i. e. raiding other jurisdictions, cutting daily wage rates in a price war with other unions, and the reduction in "manning scale" to gain representational power.

These benefits to the union and the labor movement would be lost in most instances without the discretionary authority in courts to grant counsel fees. Indeed, cases vindicating such rights would never be filed. This case is a typical example. It has been pending almost ten years, has been to this court twice, has consumed hundreds of hours of the court time of four trial judges, accumulated thousands of pages of motions, written interrogatories, briefs, arguments, opinions, etc. some 1200 pages of testimony, two panels of judges of this court and literally thousands of hours of counsel time. The record shows that it took six months for Cole to secure his temporary injunction, largely

because of the dilatory action of the union and its officers; seven years to get his trial and now two years to obtain the final vindication of a right not only specifically secured to him in the Act itself but fundamental to a free society as well. Had it not been for the devotion of his counsel largely on a *pro bono publico* basis, Cole would not have ever attained this basic right. Not to award counsel fees in cases such as this would be tantamount to repealing the Act itself by frustrating its basic purpose. It is difficult for individual members of labor unions to stand up and fight those who are in charge. The latter have the treasury of the union at their command and the paid union counsel at their beck and call while the member is on his own. Congress passed the Act in an effort to offset the heavy hand of the union by giving the union member the aid of the federal courts. It is true that it did not specifically grant counsel fees, but it did authorize the courts to grant "such relief as may be appropriate." Counsel fees in cases of this kind are not only appropriate, they are imperative to preserve the Congressional purpose. An individual union member could not carry such a heavy financial burden. Without counsel fees the grant of federal jurisdiction is but a gesture for few union members could avail themselves of it. It is but equitable and fair that counsel fees in appropriate cases be awarded just as the union pays those of the officers and of itself in Section 102 litigation. As the Third Circuit said in *Artner* v. *Soloner*, *supra*:

> "In the context of the Labor Management Act it is untenable to assert that in establishing the bill of rights under the Act Congress intended to have those rights diminished by the unescapable fact that an aggrieved union member would be unable to finance litigation and would have no hope of remuneration even if he could some way or other proceed with his suit." At 355.

Appendix B

The union notes that Senator Goldwater and others opposed the bill because it failed to specifically permit the award of counsel fees. Leg. Hist. Vol. II, p. 1281, dissenting House Report p. 2492 (1959). The 3rd Circuit has a complete answer to this. 384 F. 2d at p. 351. As we see it, the supporters of the Bill thought that its language was so broad that it would give "a wide latitude to grant relief according to the necessities of the case," Id. Vol. II, p. 1584 (1960), to cover "any loss suffered by a member." Id. at p. 1632. This is sufficient for us to include the awarding of counsel fees here. It is quite often necessary to graft a judicial remedy to give legislation its intended fruition.

The union also argues that, considering the Act as a whole, we should conclude that Congress has "meticulously detailed the remedies available to a plaintiff" intending thereby to "mark the boundaries of the power to award relief." *Fleischmann Corp.* v. *Maier Brewing Co., supra,* at 719, 721. In particular, it notes, as we have indicated, that counsel fees *are* specifically provided for in other sections of the Act, 29 U.S.C. §§ 431(c), 501(b), thus suggesting that they were consciously omitted from this section. But this is a *non sequitur* here. These sections have to do with narrowly defined remedies such as the examination of books and records and an accounting. Here the relief necessary cannot be as easily foreseen nor broadly specified which accounts for the unlimited language of the Congress in § 102 i.e. "such relief as may be appropriate."

3. The union argues finally that, even if counsel fees may sometimes be recovered under Section 102(a)(2), it was an abuse of the district court's discretion here because appellee's services were furnished *gratis.* We need not consider this argument, since the record shows that, rather than the A.C.L.U. bearing any of the cost, Cole and his counsel bore the cost of the litigation themselves.

For these reasons, the judgment is

Affirmed

Appendix C

(Opinion and Order of District Court)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

This is an action for an injunction, compensatory damages and counsel fees.[1] This court granted a mandatory temporary injunction directing the defendant, Seafarers International Union of North America—Atlantic, Gulf, Lakes and Inland Waters District (hereinafter District) to restore to plaintiff all the rights and privileges of membership. [Order of John F. Dooling, Jr., D.J., dated May 27, 1964. The order was affirmed by the Court of Appeals for the Second Circuit, 339 F.2d 881 (2d Cir. 1965).]

Plaintiff asserts claims under Sections 101(a)(2) and 609 of the Labor Management Reporting and Disclosure Act of 1959 (hereinafter Act) [29 U.S.C. §§ 411(a)(2) and 529].[2]

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[1] The court, by order dated April 15, 1964, struck the claim for punitive damages and attorneys' fees. (The trial court, however, restored the claim and the issues arising out of the expulsion by the plaintiff from the defendant Seafarers International Union of North America, Atlantic, Gulf, Lakes and Inland Waters District.) The said order granted leave to serve an amended complaint. Thereafter, by order dated July 14, 1964, the second claim stated in the complaint against the defendant Paul Hall was stricken.

[2] U.S.C. § 411(a)(2).

Freedom of speech and assembly.—Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's

Appendix C

The plaintiff, in early 1948, was Executive Vice President of the United Financial Employees. He sought the help of defendant Paul Hall (who was then Secretary-Treasurer of the District) in organizing employees working in the Wall Street area in the exchanges and brokerage houses. Plaintiff's efforts proved unsuccessful and he again sought Paul Hall's help in obtaining employment. Defendant responded by placing the plaintiff on the union payroll as an office employee. Thereafter, defendant Paul Hall was instrumental in obtaining employment for plaintiff on a sand barge in New York Harbor. Plaintiff became a member of the defendant District in 1949. The plaintiff came to the defendant Paul Hall on other occasions in seeking employment at sea and on shore.

On August 24, 1954, the plaintiff decided to enter union politics and asked the defendant Paul Hall to put him on the latter's slate for office. Not receiving a favorable response, the plaintiff, at a later date, decided to challenge the defendant, Paul Hall, for office. Plaintiff thereafter criticized the union and its officers in the manner in which union funds were handled.

Plaintiff decided to make his bid for membership backing at a regular meeting of the District held on August

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established and reasonable rules pertaining to the conduct of meetings: *Provided*, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

29 U.S.C. § 529.

Prohibition on certain discipline by labor organization.—It shall be unlawful for any labor organization, or any officer, agent, shop steward, or other representative of a labor organization, or any employee thereof to fine, suspend, expel, or otherwise discipline any of its members for exercising any right to which he is entitled under the provisions of this chapter. The provisions of Section 412 of this title shall be applicable in the endorsement of this section.

6, 1962. He prepared a list of preambles and resolutions. The Chairman of the meeting, a brother of the defendant Paul Hall, recognized the plaintiff when he asked for the floor and plaintiff thereupon started to read the preambles and proposals. The chair interrupted the plaintiff and directed an officer of the union to read the preambles and resolutions. The preambles generally particularized grievances concerning rules and practices in hiring while the resolutions were offered as amendments to "shipping rules" which concerned working conditions. They included, among other proposals, the elimination of the practice of preferring members for jobs who have served as pickets, fairness of posting of available jobs, the manner of distributing jobs and uniformity of shipping rules and strict observance of shipping rules. In the discussion that followed the reading of the preamble and resolutions, the defendant Hall spoke in opposition and briefly alluded to past favors of which the plaintiff was beneficiary and described the plaintiff as an ingrate. The chair refused the plaintiff the floor while the preambles and resolutions were before the membership.

After defendant Paul Hall spoke, the matter was taken to a vote and only the plaintiff and another member voted in support of the preambles and resolutions offered.

A charge was filed against the plaintiff claiming a violation of Article XVI, Section 2, Paragraph (h) of the District's Constitution.[3] The charges were thereupon presented to the membership meeting of the District on September 4, 1962. On September 5, 1962, the defendant District served a copy of the charges by registered mail and affixed a notice of the time and place for the holding

[3] Article XVI, Section 2, Paragraph (h) recites the following:

Deliberate and unauthorized interference, or deliberate and malicious vilification, with regard to the execution of the duties of any office or job.

of a hearing on the charges and notice of a special meeting called to elect a Trial Committee as provided by the District's Constitution.

The Trial Committee found that the plaintiff's statement, read at the meeting of August 6, 1962, was "a deliberate and malicious vilification, with regard to the execution of the duties of any office or job" and, therefore, a violation of Article XVI, Section 2, Paragraph (h) of the Constitution. The Trial Committee thereupon recommended the expulsion of the plaintiff from membership in the District.

Thereafter, the Trial Committee's recommendations were accepted at regular meetings of the membership held at the various ports; the expulsion became effective upon acceptance by the membership and plaintiff was so notified on November 26, 1962. Plaintiff was reinstated pursuant to the temporary injunction order issued by Judge Dooling on May 27, 1964.

The plaintiff raises a serious question in challenging the procedure employed by the defendant District in the manner of choosing and the composition of the Trial Committee as a violation of his right to procedural due process. Since the court finds that the expulsion violated the plaintiff's right of free speech under Section 101(a)(2) of the Act [29 U.S.C. § 411(a)(2)], the court finds the issue moot.

The charges and accusation made by the plaintiff in the preambles and resolutions were made at a regular meeting of the defendant District and only members of the District were present.

Plaintiff's Expulsion From the Defendant District Union

Section 101(a)(2) of the Act [29 U.S.C. § 411(a)(2)] was designed to promote the "full and active participation by the rank and file in the affairs of the union", *American*

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Fed'n of Musicians v. *Wittstein*, 379 U.S. 171, 182-83, 85 S.Ct. 300, 307 (1967); *Navarro* v. *Gannon*, 385 F.2d 512 (2d Cir. 1967), and to protect democratic, participatory rights in union affairs. Atleson, *A Union's Member's Right of Free Speech and Assembly: Institutional Interests and Individual Rights*, 51 Minn. L. Rev. 403, 404 (1967). The "Bill of Rights of Members of Labor Organizations" section was enacted by Congress without the benefit of extensive committee consideration; rather it was the product of an amendment arising from debate on the floor. Such circumstance has caused one court to note:

> The Bill of Rights (Title I) of the LMRDA did not enjoy an orderly genesis. Consequently, the statutory language and the legislative history are a source of confusion as well as enlightenment. The courts, therefore, have substantially shaped the Bill of Rights into a guarantee of union democracy with the right of free speech enjoying a particularly favored position.

International Ass'n of Machinists Lodge No. 2 v. *Nix*, 415 F.2d 212, 217 (5th Cir. 1969). Hence the purpose of including such guarantees in the Act was to "protect the rights of union members to discuss freely and criticize the management of their unions and the conduct of their officers." *Salzhandler* v. *Caputo*, 316 F.2d 445, 448-49 (2d Cir.), *cert. denied*, 375 U.S. 943, 84 S.Ct. 344 (1963). The Congressional intent was to remove from union officials the ability "to silence criticism and punish those who dare to complain" through the use of their disciplinary power. *Id.* at 449. *See also International Ass'n of Machinists Lodge No. 2* v. *Nix, supra; Archibald* v. *International Union of Opearting Eng'rs*, 276 F. Supp. 326 (D. R.I. 1967); and *Graham* v. *Soloner*, 220 F. Supp. 711 (E.D. Pa. 1963). These protections have been characterized as the

checks and balances which help to assure and preserve union democracy. *Gartner* v. *Soloner*, 220 F. Supp. 115, 118 (E.D. Pa. 1963).

The rights which have been guaranteed to union members under the Bill of Rights are not without limitation. Section 411(a)(2) contains what is commonly referred to as the "proviso", which limits the exercise of a member's right in two instances. The proviso permits a labor organization (1) to "adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution, and (2) to require "refraining from conduct that would interfere with its [the union's] performance of its legal or contractual obligations." It is under the first exception that the defendant union alleges its discipline is proper. Inquiry must therefore be made as to what conduct is within the general protection of the Act and, also, as to what discipline is permissible within the proviso.

Section 101(a)(2) of the Act guarantees to union members the right

> to express any views, arguments, or opinion; and to express at meetings of the labor organization his views . . . upon any business properly before the meeting . . .

This right is circumscribed only by the member's obligation (1) "toward the organization as an institution"; and (2) not to interfere with the union's performance "of its legal or contractal obligations."

The defendant claims that the plaintiff violated the reasonable rules adopted by the defendant District to enforce the obligation of the plaintiff to the defendant District as an institution. Speech does not fall outside the protected area because it constitutes malicious vilification. *Cole* v.

Hall, 339 F.2d 881 (2d Cir. 1965),[4] nor because the speech is false and libelous. *Salzhandler* v. *Caputo, supra; Giordani* v. *Upholsterers International Union of North America*, 403 F.2d 85 (2d Cir. 1968).

It may be that attacks such as those made here by the plaintiff of favoritism, mishandling of funds, "job raiding", and the like may have embarrassed the defendant union and its officers; it may be, as the union contends, that the plaintiff's underlying union philosophy would result in a decrease in the number of union jobs available, would reduce both the union membership and the treasury, however, the "proviso" in the statute did not intend to discourage criticism merely because the ultimate result would not benefit the union.

In *Giordani* v. *Upholsterers International Union of North America, supra*, plaintiff charged the union and its officers with misusing welfare and compensation funds and circulated a letter to the union membership and public officials, including senators and congressmen. The defendant union contended that the letters were not protected under the statute since they ". . . tended to undermine the U.I.U. as an institution and therefore was subject to discipline under the proviso" (at page 89). The court rejected the claim saying:

> We made it clear in *Salzhandler* that one of the primary purposes of the Act was to curtail such vices as the mismanagement of union funds, and that the protection of union members' right to discussion on this subject is an important safeguard to that end. If unions could discipline such speech on the ground that it weakened their power as an institution, this safeguard would be rendered entirely ephemeral and ineffectual.

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[4] Affirming Judge Dooling's order in the instant case.

403 F.2d at 89-90. Similarly, in *Farowitz* v. *Associated Musicians of Greater New York*, 330 F.2d 999 (2nd Cir. 1964), plaintiff member distributed leaflets urging members not to pay a tax imposed by the union on the ground that the tax was unlawful. Defendant expelled the plaintiff from membership charging that plaintiff thereby had sought "to undermine the very existence of the Local." The court stated that Farowitz reasonably believed that the tax was illegal and held (at page 1002):

> We do not say that there may not be some situation in which a union member would not be protected against disciplinary measures if he were to urge other members to forego paying their dues. All we decide is that a member having such good reasons as here to believe that the collection of taxes or dues runs afoul of the law has the right to call this to the attention of the membership and to urge that they refrain from paying such assessments.
>
> Thus it is clear here, as in *Salzhandler*, the elements of the proviso to § 101(a)(2) are not satisfied. A rule which subjects a member to expulsion for complaining of a tax which he reasonably believes to be illegal is not a reasonable rule.

The only cases which have limited the right to free speech under the first proviso are those which seek to enforce reasonable rules in the conduct of union meetings. v. *Watson*, 338 F.2d 678 (7th Cir. 1964), *cert. denied*, 380 U.S. 963, 85 S.Ct. 1107 (1965). *See, also, Navarro* v. *Gannon*, 385 F.2d 512 (2d Cir. 1967). Other instances will surely be found like the hypothetical claim in *Farowitz*, *supra*, where speech might place the union in jeopardy where a member urges others not to pay dues and other cases might be cited where the effectiveness of the

union is placed in jeopardy. Where a member, however, presents charges in an orderly fashion at a regular union meeting, such speech falls clearly within the protected area. It is certainly within the limits defined by *Salzhandler* and *Giordani*.

The disciplinary action taken by the union violated the statute and the temporary injunction directing that the plaintiff be restored to all the rights and privileges of membership must be terminated.

Plaintiff suffered no loss of wages as a result of his expulsion from the union. During the period of his expulsion, his right to bid for jobs remained unimpaired. Upon being reinstated and in accordance with the temporary injunction order, he paid the defendant District back dues in the sum of $280.00. Though he was deprived of his right to attend meetings, and run for union office, he retained the other benefits of union membership, i.e., insurance and welfare rights. *Cf. International Bhd. of Boilermakers* v. *Braswell*, 388 F.2d 193 (5th Cir. 1968). The back dues are, therefore, not a loss.

The record is barren of any proof on which the court might make a determination of the value of the right to attend meetings and run for union office.

Compensatory damages are recoverable for any loss or injury which "directly or proximately resulted from the alleged violation of the [Act]." *McGraw* v. *United Ass'n of Journeymen & Apprentices of Plumbing*, 341 F.2d 705, 710 (6th Cir. 1965). *Cf. Ryan* v. *International Bhd. of Elec. Workers*, 387 F.2d 778 (7th Cir. 1967); *Archibald* v. *Engineers Local 57*, 276 F. Supp. 326 (D.R.I. 1967); and *Magelssen* v. *Plasters' Local 518*, 240 F. Supp. 259 (W.D.Mo. 1965).

The plaintiff has failed to prove any other items of compensatory damages, *i.e.*, injury to reputation and accompanying emotional strain. See *Simmons* v. *Arisco, Local 713, Textile Workers Union of America*, 350 F.2d

1012 (4th Cir. 1965); and *International Bhd. of Boilermakers* v. *Rafferty*, 346 F.2d 307 (9th Cir. 1965).

PUNITIVE DAMAGES

The court finds that the defendants, in good faith, believed that they had a right to charge and discipline the plaintiff for his actions at the meeting of August 6, 1962. Absent a showing of malice, punitive damages are not recoverable. *International Bhd. of Boilermakers* v. *Braswell*, 388 F.2d 193 (5th Cir. 1968); *Farowitz* v. *Associated Musicians of Greater N. Y.*, 241 F. Supp. 895 (S.D.N.Y. 1965).

COUNSEL FEES

At this writing, the Circuit Court of this circuit has not passed on the propriety of the award of counsel fees in an action under the Act, Section 102 of the Act (29 U.S.C. § 412) is silent on the question. The failure to make express provision is cited as a reason for refusing to make such an award.

Section 201 of the Act (29 U.S.C. § 431) and Section 501(b) of the Act [29 U.S.C. § 501(b)] [5] provide for the award of discretionary counsel fees. The district courts of this circuit are in disagreement. In *Vars* v. *International Bhd. of Boilermakers*, 215 F. Supp. 943 (D. Conn.), *aff'd on other grounds*, 320 F.2d 526 (2d Cir. 1963), the district court, citing the dissenting views of the House

[5] Section 201 of the Act provides for the discretionary award of counsel fees in an action in which a member seeks to examine books, records and accounts to verify annual financial reports.

Section 501(b) of the Act provides for a discretionary award of counsel fees where an action is brought by a member against a union official to recover damages or for an accounting for the benefit of a labor organization based on a claim that such union official is violating his duties.

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Committee Report (the majority report made no reference to the award of counsel fees) denied counsel fees to the successful plaintiff. To the same effect, see *McGraw* v. *United Ass'n of Journeymen & Apprentices*, 216 F. Supp. 655, 664; *Leonard* v. *M.I.T. Employees' Union*, 225 F. Supp. 937 (D.Mass. 1964); *Magelssen* v *Plasters' Local 518*, 240 F. Supp. 259 (W.D. Mo. 1965); *Bailey* v. *Netter*, 266 F. Supp. 165 (E.D.La. 1967); *Jaques* v. *International Longshoremen's Ass'n*, 246 F. Supp. 857 (E.D.La. 1965).

This court is persuaded by *Gartner* v. *Soloner*, 384 F.2d 348 (3d Cir. 1967), which found authority for the award of counsel fees in a Section 102 action after reviewing the legislative history. As previously noted, the pertinent section was added to the Act as an amendment arising from the floor and was not subject to the usual intensive committee consideration. This action accounts, in part, for the absence of affirmative statements by members of the committee in favor of the award of counsel fees.

The court, in *Gartner*, at page 355, said:

> In the context of the Labor Management Act it is untenable to assert that in establishing the bill of rights under the Act, Congress intended to have those rights diminished by the unescapable fact that an aggrieved union member would be unable to finance litigation and would have no hope of remuneration even if he could some way or other proceed with his suit.

Gartner was followed in *Sands* v. *Abelli*, 290 F. Supp. 677 (S.D.N.Y. 1968).

The disparity in economic power would discourage members from contesting union action and attempting to right union wrongs It is essential to the vindication of the rights granted by the statute that an award of counsel

fees be made to successful plaintiffs. The court does not express any view as to the recoverability of counsel fees where the action is brought in good faith but plaintiff is unsuccessful.

The court should not be denied the power to award counsel fees in a case such as this because of the absence of express provision. *Mills* v. *Electric Auto-Lite Company*, 396 U.S. 375, 90 S. Ct. 616 (1970).

The court directs the attorney for the plaintiff and the attorney for the defendants to file affidavits on the issue of reasonable counsel fees due the plaintiff prior to the date of the settlement of judgment as hereinafter provided. If the issue cannot be resolved by affidavits, the court will direct an evidentiary hearing.

The plaintiff is entitled to a judgment awarding him a permanent injunction restoring him to membership in the defendant District and a sum to be fixed as award for reasonable counsel fees for the institution and prosecution of this law suit, which said sum shall be paid directly to his attorney, Burton Hall, Esq.

Settle judgment on not less than five (5) days' notice to be served personally or by mail.

JACOB MISHLER
U. S. D. J.

Appendix D

(Decision and Order of District Court)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

The issue of reasonable value of the counsel fee awarded to plaintiff's counsel has been stipulated by the parties to be $5,500. Judgment to be settled on five days' notice to be served either personally or by mail in accordance with the findings of fact and conclusions of law made and dated May 21, 1971, on or before September 1, 1971.

So ordered.

JACOB MISHLER
U. S. D. J.

Appendix E

(Findings of Fact and Conclusions of Law of District Court)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

May 21, 1971

The above case having come on for trial to the court, without a jury, I make the following Findings of Fact and Conclusions of Law:

1. The court has jurisdiction of the subject matter of this action brought pursuant to Sections 102 and 609 of the Labor Management Reporting and Disclosure Act of 1959 (29 U.S.C. §§ 412 and 529) (hereinafter LMRDA); 28 U.S.C. § 1331.

2. The defendant Seafarers International Union of North America—Atlantic, Gulf, Lakes and Inland Waters District (hereinafter District) is and has been at all times herein relevant a "labor organization" within the definition set forth in LMRDA § 3(i), 29 U.S.C. § 402(i), whose principal office is at 675 Fourth Avenue, Brooklyn, New York, within the territorial jurisdiction of this court.

3. The defendant District is and at all times relevant has been affiliated with the Seafarers International Union of North America (hereinafter International), which International is a labor organization within the meaning of LMRDA § 3(i), 29 U.S.C. § 402(i).

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4. (a) The defendant Paul Hall was at all the times relevant and since 1960, President of the District and, prior to 1960, served as Secretary-Treasurer of the District.

(b) The defendant Paul Hall was at all the times relevant and since 1959, President of the International and, prior thereto, served as Secretary-Treasurer of the International.

(c) The office of President is the Chief Executive office in both the District and the International.

5. (a) The defendant Cal Tanner was at all times relevant Executive Vice President.

(b) The defendant Earl Shepard was at all times relevant Vice President in charge of the Atlantic Coast.

(c) The defendant Al Kerr was at all times relevant a Secretary-Treasurer of the District.

6. (a) In 1946, plaintiff was Executive Vice President of the United Financial Employees, a financial union representing employees of the various stock exchanges and some brokerage houses in and around the Wall Street area.

(b) During that year, while Executive Vice President of United Financial Employees, the plaintiff became associated with the District;

(c) During the association, the District aided United Financial Employees in its union activities.

7. (a) United Financial Employees was ineffective and became insolvent and in 1948 plaintiff was unemployed.

(b) Plaintiff sought the help of the defendant Paul Hall.

(c) The defendant Paul Hall employed the plaintiff as a District employee until December 13, 1948.

(d) On December 13, 1948, through the efforts of defendant District, plaintiff was employed by the Maritime

Allied Workers in the Port of New York. Plaintiff was employed as a seaman on a sand barge, which was a favored type of employment since the seaman was able to remain in the Port of New York.

(e) In mid-1948, plaintiff became a member of the District and the International and he received his union card in mid-1949.

(f) Plaintiff continued his employment on the sand barge until May, 1951, when it terminated because the barge sank, at which time plaintiff registered and shipped out as a regular seaman.

(g) Between June, 1951 and August 13, 1951, plaintiff shipped out on the Bull Line on a vessel that plied between New York and Puerto Rico.

(h) Plaintiff's wife fell ill and plaintiff sought defendant Paul Hall's help in again obtaining work which would afford him the opportunity of remaining ashore. Defendant Paul Hall employed the plaintiff as an employee of the Union from August 14, 1951 to March, 1954.

(i) During the period 1954 to 1958, plaintiff was employed on Seatrain vessels which touched coast ports between New York and Texas. Plaintiff chose this type of employment because it afforded him the opportunity to keep in close communication with New York and to make frequent visits to New York during the trips.

(j) Plaintiff was employed aboard the vessel as a wiper. This classification is lowest in salary aboard the vessel.

8. (a) In or about 1955, the Seafarers Welfare Plan set up a scholarship for children of seafarers.

(b) Plaintiff's daughter was awarded a four year scholarship at $1,500.00 per year in 1955.

(c) Plaintiff's daughter entered the University of Connecticut.

(d) The scholarship was revoked because the plaintiff's daughter failed to maintain a B average in accordance with the conditions of the grant.

9. (a) On February 21, 1958, plaintiff wrote a letter to Robert T. Creesy, Fund Administrator, charging him with mismanagement.

(b) On the same day, February 21, 1958, plaintiff wrote a letter to the editor of Seafarers Log, the District's publication, criticizing union policies and the practices of union officials, i.e., that the union entered into "sweetheart contracts" and complaining of the grievance procedures.

10. On January 21, 1959, plaintiff wrote a letter to defendant Hall wherein he explained that the motivation for the complaints set forth in paragraph "9" was his resentment over the revocation of his daughter's scholarship.

11. For some time, beginning in about 1940, defendant District (whose predecessor was affiliated with the A.F. of L. before the merger with the C.I.O.) and the National Maritime Union (hereinafter NMU) (affiliated with the C.I.O. before the merger) competed for membership among the unlicensed seamen.

12. (a) It was and is the custom and practice in the shipping industry that the employer, i.e., the ship owner or operator, enters into a contract with the union to supply seamen to man the ships.

(b) In 1957, Moore-McCormack Lines purchased eight ships from Seas Shipping Corp., which operated the ships under the name Robin Lines. The District was in contractual relationship with Seas Shipping Corp. NMU was in contractual relationship with Moore-McCormack Lines. The dispute was submitted to the National Labor Relations Board, which ruled that each of the vessels was

to be a separate bargaining unit and directed that elections be held on each ship.

13. (a) During the late 1940's, the Marine Engineers Beneficial Association (hereinafter MEBA) represented certain engineers on Isbrandtsen and Isthmian ships.

(b) At that time, a contract dispute arose between MEBA and the two aforementioned companies as a result of which MEBA members went out on strike.

(c) In response to a request by these companies for assistance in settling labor troubles, the defendant District helped form the Brotherhood of Marine Engineers (hereinafter BME).

(d) BME men crossed the MEBA picket lines thereby breaking the MEBA strike.

14. In 1959, BME became a District of the MEBA.

15. (a) Prior to 1962, Isbrandtsen acquired a controlling interest in the American Export Lines.

(b) During 1962, both companies announced plans to merge the Isbrandtsen ships with the American Export fleet.

(c) The Isbrandtsen ships were under contract to MEBA whereas the Export vessels were under contract to the Brotherhood of Marine Officers (hereinafter BMO).

(d) MEBA opposed this action on the ground that it was being taken for the sole purpose of forcing MEBA out and bringing in the BMO.

(e) BMO contracts were more favorable to the shipping company.

(f) BMO was originally a company union and until 1960 was affiliated with District 50 of the United Mine Workers. In 1961, BMO terminated its former affiliation and joined with the NMU.

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16. (a) On August 6, 1962, at a regular meeting of the membership, the plaintiff presented a set of preambles and proposed resolutions on shipping rules.

(b) After the plaintiff had read a portion of the preambles, the Chairman, William Hall, brother of the defendant Paul Hall, interrupted the plaintiff and ruled that the plaintiff was out of order and directed that he sit down. The Chairman thereupon continued with other business before the meeting.

(c) The defendant Paul Hall arose and stated that plaintiff had a right to speak and requested that the membership be allowed to hear the proposed preambles and resolutions. Thereupon the Chairman directed that the proposed preambles and resolutions be read by the reading clerk, one Patrolman Campbell.

(d) Defendant Paul Hall arose in opposition to the preambles and characterized the plaintiff as an ingrate and thereupon declared that the plaintiff had violated the union rules in the past and that the plaintiff should have been charged with violations a long time ago.

(e) Plaintiff had written out twelve preamble clauses which read as follows:

> WHEREAS, the Seafarers' Log of January, 1962, glibly promised to give the membership a full printing of our revised shipping rules, then left the matter hanging high in the air without so much as an explanation for failure to follow through, we detect another characteristic trick of Paul Hall's type of democracy meant to con a guillible public into believing we are a well informed rank-and-file, while in reality we function in groping ignorance;
>
> WHEREAS, the only working set of shipping rules made available to us are those contained in the SIU Handbook dating back to February 15, 1960, which

includes only eleven of the at least 58 articles now amassed, the unpublished improvisations apparently are not for general distribution;

WHEREAS, the amendment of November 1, 1961, known as Action 58a, stating that "within each class in entry-ratings of deck, engine, and steward departments preference in shipping shall be given those men who are endorsed as lifeboatmen", is posted on the patrolmen's cage at Headquarters, and while its general terms refer to Unionwide enforcement, yet it is applied solely and therefore discriminatorily to the already much put on Port of New York members;

WHEREAS, seniority rules enacted under the guise of exercising port autonomy, but in conflict with the letter and spirit of our contracts—like those requirements of lifeboatman ticket and Pete Larsen Clinic card, which are mandatory in only certain ports, yet regarded so lightly in others as even to be ignored—cannot be permitted to hide behind the Seafarers Appeals Board for enforcement of them since they violate the time-tested code of a Unionwide equal treatment rotary hiring list, and must thereby be considered arbitrary, capricious, and unlawful rules.

WHEREAS, such a system of super-seniority additionally based on special services rendered officials is a further invasion of our Union contracts since that too tampers with the regular rotation of our legally-bound shipping list, so let's face it, any jobs withheld as rewards for those performing such voluntary duties can only be deemed as backdoor shipping;

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WHEREAS, shipping cards of volunteer workers are held by the Union while they are away from the hiring hall, implying that the absentees will be looked out for during shipping calls despite prescribed rules which require that (1) a seaman must be present in person when a job is offered him and (2) in no case shall a job be called out unless it is first posted on the shipping board, so an end must be made of this practice if we are to preserve our American principle of first come first served;

WHEREAS, machine policy deliberately creates a constant state of agitated ferment so their contrived emergencies can be utilized to by-pass general rules and individual rights in their never-ending sanctimonious crusades to save the Union, consequently curbs on the Union's over-reaching demands have to be devised;

WHEREAS, moral arguments fabricated to justify SIU's interference in interunion beefs are both contradictory and phony—a classic example being our current picketing of American Export ships because the Company proposes to man its Isbrandtsen vessels with licensed members of the Brotherhood of Marine Officers—we have simply to jog our memories slightly to recall that Paul Hall stole those same engineers jobs from MEBA in 1951, when he set BME up as a dual organization;

WHEREAS, raiding a duly certified bargaining agent's contractual jurisdiction was also the cause of Moormac's recent tie-ups, the pattern for such organizational hijacking was instituted on the Lakes more than a year ago when Paul Hall effectively argued that Lachlan Macleay's transfer to Gulf Canal Line justified SIU in undercutting NMU's

daily wage rate from $28.46 to $17.50, and its manning scale from 11 men to 7 in order to gain representational power, and by his timely intervention in another NMU labor management relationship, where Mississippi Barge Line of St. Louis was replaced by a dummy corporation, Inland Towers of Davenport (La.), the change of unions in this raid was allowed to be excused on the grounds of a similar wage slash plus reduction of the crew of the Valley from 17 to 11 men;

WHEREAS, leadership double talking and double-crossing has only led the expected retaliatory attrition, it should be a mere matter of time before Paul Hall's own logic catches up with our Bull, Bloomfield, Robin, and Isthmian jobs, either from being swallowed up by NMU's leviathan like companies or the not too-impossible swing-over of SIU crews to NMU in labor board elections because of our Union's company minded policies of lone-wolf wage freezes, crew-cutting automation clauses, and belly-jobbing food plans, hardly forgetting those oppressive Union fees which further single us Seafarers out as the prime patsies in the maritime labor picture.

WHEREAS, the same motivation which causes Union officers to keep us in the dark about essential truths concerning our job security which is daily being gambled with in the power play for higher stakes; has also withdrawn our shipping rules from us, so that by the administration's over-subtle interpretation of our hiring process the membership may be trapped into cooperating in their own deception and exploitation;

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WHEREAS, dog-eat-dog warfare has resulted in many infringements on our shipping rights, more airtight safeguards must be enacted to protect us against further betrayals by publicity-seeking officials;

17. Plaintiff proposed four resolutions as follows:

THEREFORE, BE IT RESOLVED, that the practice of collecting shipping cards from those going on picket duty, or serving in other voluntary ways, be discontinued in order to end persistent suspicions and harmful rumors, and that strict adherence be observed in the rules which require ALL jobs to be posted on the shipping board, and every one of them to be competed for in person.

NEXT BE IT RESOLVED, that all open jobs up for grabs by C-card men be dispatched in the hiring hall, where the membership can witness for itself the honesty of the hiring process, immediately following the final daily call;

FURTHER, BE IT RESOLVED, as an additional check on the purity of the procedure, a dispatcher's list of hourly job calls of the day before, countersigned by the Port Agent, be posted daily on the bulletin board complete with the name and registration number of the job's original taker, as well as those of the eventual shippers whenever such jobs have been turned back, and;

FINALLY, BE IT RESOLVED, that shipping rules be uniform throughout the Union, and equally binding on all ports, and that a comprehensive compilation of the rules be made readily available to all members as the one accurate guide to Seafarers under our hiring hall system.

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18. (a) Plaintiff's resolutions were put to a vote after defendant Paul Hall spoke as set forth in finding number "16(d)".

(b) Plaintiff's resolutions were defeated with all members present voting "against" and only plaintiff and the member who had seconded the resolutions voting "in favor."

19. On or about September 4, 1962, Joseph DiGiorgio, Port Agent of the Port of New York and a member of the defendant District, filed a "Charge Sheet" against the plaintiff, which sheet charged plaintiff as follows:

> 1) Violation of Article XVI, Section 2, Paragraph (h) of the Constitution. Deliberate and unauthorized interference, or deliberate and malicious vilification with regard to the execution of the duties of any office or job; In that, on August 6, 1962 Headquarters Meeting, John Cole deliberately and maliciously charged the Officers and Union in the following:
>
> a) Raiding a duly certified bargaining agent on contractual jurisdiction.
>
> b) Moral arguments fabricated to justify SIU's interference in inter-union's beefs are both contradictory and phony.
>
> c) Charged an Officer of this Union with the stealing of jobs from another union.

20. The first charge against the plaintiff denoted "a" was based upon the recitals contained in the ninth "Whereas" clause of the plaintiff's resolution set forth in finding "16".

21. The second and third charges against the plaintiff denoted "b" and "c" respectively were based upon recitals

contained in the eighth "Whereas" clause of the plaintiff's resolution set forth in finding "16".

22. (a) These charges were presented to the membership at a meeting at the Port of New York on September 4, 1962 and were accepted by a majority vote.

(b) On September 5, 1962, the plaintiff was duly notified and on September 6, 1962 received notification that charges had been filed against him and that he was to appear on October, 9, 1962, at which time a Trial Committee would be elected at a Special Meeting to be held for that purpose in accordance with the provisions of the District Constitution.

23. (a) On October 8, 1962, the plaintiff left the ship upon which he was employed in Texas City and flew to New York to attend his trial.

(b) On October 9, 1962, the Trial Committee was duly elected at a membership meeting in accordance with the District Constitution.

(c) That all the members of the Trial Committee were members of the defendant District who had voted to accept the charges made by Mr. DiGiorgio at the meeting of September 4, 1962.

(d) Shortly thereafter, the Trial Committee convened with the plaintiff present.

(e) The plaintiff and Mr. DiGiorgio remained outside the hearing room while the Vice President, Mr. Shepard, went into the room with the Trial Committee.

(f) Plaintiff requested and was denied the opportunity to have either an electronic recording or a manual recording of the proceedings.

(g) Mr. Adelbert Arnold, a member of the Trial Committee, was designated to make notes of the proceeding.

He did not make a verbatim recording but brief notes in longhand.

(h) The plaintiff was permitted to present a written defense to the charges which he had prepared wherein he admitted that he had made the statements but denied that they constituted a malicious vilification.

(i) The Committee's recommendation disclosed no evidence upon which a finding of malicious vilification could be sustained.

The Committee disclosed no evidence to support a finding that the plaintiff's conduct at the meeting of August 6, 1962 was violative of Article XVI, Section 2, Paragraph (h) of the Constitution.

24. The plaintiff pursued the appellate procedure provided in Article XV of the Union Constitution and the finding of the Trial Committee was affirmed.

25. Plaintiff mistakenly appealed to defendant Paul Hall in his capacity as International President on February 1, 1963, and defendant Paul Hall replied by letter dated February 7, 1963 that appeal to him was improper and thereupon advised the plaintiff that his expulsion would not affect his right to "ship out" through the union hiring hall.

26. (a) Plaintiff instituted suit on December 10, 1963, by filing a complaint in the office of the Clerk of this Court.

(b) On May 27, 1964, plaintiff was restored to membership by order of John F. Dooling, Jr., U.S.D.J., granting plaintiff's application for temporary injunction, and has continued to be a member to the present time.

27. Since the plaintiff left the employ of the union to ship out on the Mississippi Company vessel, the Lawrence

Victory, on March 23, 1954, the plaintiff's employment record is as follows:

(a) From March 23, 1954 to May 20, 1954, the plaintiff was employed on the Mississippi Company vessel, the Lawrence Victory;

(b) From May 21, 1954, to May 25, 1954, the plaintiff was unemployed;

(c) From May 26, 1954 to May 31, 1954, the plaintiff was employed aboard the Penn Transportation Company vessel the William Courage;

(d) From June 1, 1954 to June 9, 1954, the plaintiff was not employed;

(e) From June 10, 1954 to September 17, 1955, the plaintiff was employed aboard the Seatrain New York;

(f) The plaintiff left the employment referred to in Finding 27(e) above as a result of an injury sustained while aboard the vessel. As a result of this injury, plaintiff was unfit for duty;

(g) From January 13, 1956 to June 3, 1956, the plaintiff was employed aboard a Waterman vessel;

(h) From June 4, 1956 to June 15, 1956, the plaintiff was not employed;

(i) From June 16, 1956 to April 4, 1958, the plaintiff was employed aboard the Seatrain New York;

(j) From April 5, 1958 to June 30, 1958, the plaintiff was not employed;

(k) From July 1, 1958 to October 7, 1959, the plaintiff was employed aboard the Seatrain New York;

(l) From October 8, 1959 to December 10, 1959, the plaintiff was not employed;

(m) From December 11, 1959 to June 8, 1962, the plaintiff was employed aboard the Seatrain Georgia;

(n) From June 9, 1962 to August 28, 1962, the plaintiff was not employed;

(o) From August 29, 1962 to October 8, 1962, the plaintiff was employed on board the Seatrain Texas;

(p) On October 8, 1962, the plaintiff left the Seatrain Texas in Texas City, Texas to return to New York to be present at his trial and subsequent appeals;

(q) From February 13, 1963 to May 13, 1963, the plaintiff was employed aboard the SS Vivian;

(r) From May 14, 1963 to July 18, 1963, the plaintiff was not employed;

(s) From July 19, 1963 to January 11, 1965, the plaintiff was employed aboard the Seatrain Texas;

(t) From January 12, 1965 to February 15, 1965, the plaintiff was not employed;

(u) From February 16, 1965 to June 2, 1966, the plaintiff was employed aboard the Seatrain Texas;

(v) From June 3, 1966 to October 3, 1966, the plaintiff was not employed;

(w) From October 4, 1966 to December 15, 1966, the plaintiff was employed on the Seatrain Georgia;

(x) From December 16, 1966 to March 17, 1967, the plaintiff was not employed;

(y) From March 18, 1967 through May, 1967, the plaintiff was employed aboard the Sealand Summit. In May, 1967, the plaintiff was injured while working on the Summit;

(z) Soon after plaintiff was injured aboard the Summit, the plaintiff retired and is currently receiving a union pension.

28. During the periods of unemployment listed in findings numbered 27(r), (v) and (x), the plaintiff admits that there were wipers jobs put up for bid in the hiring hall but plaintiff declined to bid for the jobs because they were not aboard coastwise vessels.

29. During the periods of unemployment, the plaintiff applied for and received unemployment insurance.

30. Throughout the periods of unemployment in question, the plaintiff restricted the jobs available to him through the plaintiff's own preference for coastwise vessels.

31. Plaintiff failed to prove any loss of income by reason of his expulsion.

32. (a) Plaintiff failed to prove that his expulsion from the defendant District was motivated by malice on the part of any of the defendants;

(b) Plaintiff has failed to prove that defendant Paul Hall initiated, accused or conspired with others to bring about the expulsion of the plaintiff from the defendant District except to the extent that defendant Paul Hall exercised his right to debate and vote on the issues.

33. Plaintiff has failed to sustain the burden of proof against the defendant Paul Hall, individually and as President, the defendant Al Kerr, individually and as Secretary-Treasurer, the defendant Earl Shepard, individually and as Vice President, the defendant Cal Tanner, individually and as Executive Vice President of the defendant District.

34. The complaints, grievances and accusations were, in part, motivated by plaintiff's political ambitions for union office.

Conclusions of Law

1. The court has jurisdiction of the defendant labor organization and of the subject matter of the action pur-

suant to 29 U.S.C. Sections 402(i), 412, 525 and 28 U.S.C. Section 1331.

2. The plaintiff is entitled to judgment for a mandatory permanent injunction directing that he be reinstated to membership and restored to all the financial benefits accruing to members and for a judgment for reasonable counsel fees for services rendered in his behalf by Burton Hall, Esq.

3. Defendants Paul Hall, Al Kerr, Earl Shepard and Cal Tanner are entitled to judgment dismissing the complaint.

4. The court directs that judgment shall be entered after proof of reasonable value of the services performed by Burton Hall shall have been submitted in accordance with the memorandum of decision filed herewith.

Dated: Brooklyn, New York,
May 21, 1971.

JACOB MISHLER
U. S. D. J.

Appendix F

(Amended Findings of Fact and Conclusions of Law of District Court)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

Defendants having moved to amend the findings of fact made and filed in the above matter on May 21, 1971, the said findings of fact are hereby amended as follows:

1. Finding 12(a) is amended to read as follows:

12. (a) It was and is the custom and practice in the shipping industry that the employer, i.e., the ship owner or operator, enters into a contract with the union to supply seamen to man the ships. [The union operates a hiring hall on a seniority basis in order to supply the men needed to man the ships under contract. By virtue of the contract, the employer makes contributions to funds maintained by the union for the benefit of its members to provide pension, welfare and vacation benefits.][1]

2. Finding 12(b) is amended to read as follows:

12. (b) In 1957, Moore-McCormack Lines purchased eight ships from Seas Shipping Corp., which operated the ships under the name Robin Lines. The District was in contractual relationship with Seas Shipping Corp. NMU was in contractual relationship with Moore-McCormack Lines. [A dispute arose as to which union would supply the crew for

---

[1] New material is set forth in brackets.

the Robin Line ships.] The dispute was submitted to the National Labor Relations Board, which ruled that each of the vessels was to be a separate bargaining unit and directed that elections be held on each ship.

3. Finding 12(c) is to be added following 12(b):

[12. (c) In 1962, the dispute again arose as a result of an NMU petition to the NLRB to have all the Robin Line ships become a part of the same bargaining unit. The District, in turn, filed raiding charges with the AFL-CIO and unfair labor practice charges with the NLRB. The District also began picketing Moore-McCormack vessels, which resulted in tieing up the Moore-McCormack fleet. Such picketing ceased upon the NLRB's dismissal of the NMU petition and the AFL-CIO's ruling in favor of the District.]

4. Finding 13.(b) is amended by deleting therefrom the words "At that time" and substituting therefore "in 1951", so that the same shall read as follows:

13.(b) In 1951, a contract dispute arose between MEBA and the two aforementioned companies as a result of which MEBA members went out on strike.

5. Finding 14. is amended by deleting therefrom the word "a" and inserting the numeral "2" after the word "District" so that the same shall read as follows:

14. In 1959, BME became District 2 of the MEBA.

6. Finding 15.(c) is amended by inserting the words "District 2 of the" before "MEBA" to read as follows:

15.(c) The Isbrandtsen ships were under contract to District 2 of the MEBA, whereas the Export

vessels were under contract to the Brotherhood of Marine Officers (hereinafter BMO).

7. Finding 15.(d) is amended by inserting the words "District 2 of the" before "MEBA" to read as follows:

> 15. (d) District 2 of the MEBA opposed this action on the ground that it was being taken for the sole purpose of forcing MEBA out and bringing in the BMO.

8. The court makes the following additional finding to follow finding 15. (f):

> 15. (g) District 2 of the MEBA picketed the Isbrandtsen vessels as a result of the proposed merger of Isbrandtsen into American Export, and was assisted by the District in its picketing.

In all other respects the motion to amend the Findings of Fact is hereby denied, and it is

SO ORDERED.

JACOB MISHLER
U. S. D. J.

Appendix G

(Order of Court of Appeals Denying Petition for Rehearing)

72—1003

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

—o—

JOHN COLE,

Plaintiff-Appellee,

v.

PAUL HALL, individually and as President or AL KERR, as Secretary Treasurer, or EARL SHEPARD, as Vice President, or CAL TANNER, as Executive Vice President of the Seafarers International Union of North America—Atlantic, Gulf, Lakes and Inland Waters District,

Defendants-Appellants.

—o—

A petition for a rehearing having been filed herein by counsel for the appellants,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

July 24, 1972

TOM C. CLARK
Associate Justice, Supreme Court

J. EDWARD LUMBARD
U. S. C. J.

HAROLD R. TYLER
U. S. D. J.

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IN THE

Supreme Court of the United States

October Term, 1972

No. 72-630

PAUL HALL, individually and as President or AL KERR, as Secretary Treasurer, or EARL SHEPARD, as Vice President, or CAL TANNER, as Executive Vice President of the Seafarers International Union of North America—Atlantic, Gulf, Lakes and Inland Waters District,

Petitioners,

v.

JOHN COLE,

Respondent.

PETITIONERS' REPLY TO RESPONDENT'S MOTION TO DISMISS THE GRANTED WRIT OF CERTIORARI

HOWARD SCHULMAN
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Attorney for Petitioners

Of Counsel:

SCHULMAN, ABARBANEL & SCHLESINGER
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IN THE

Supreme Court of the United States

October Term, 1972

No. 72-630

PAUL HALL, individually and as President or AL KERR, as Secretary Treasurer, or EARL SHEPARD, as Vice President, or CAL TANNER, as Executive Vice President of the Seafarers International Union of North America—Atlantic, Gulf, Lakes and Inland Waters District,

Petitioners,

v.

JOHN COLE,

Respondent.

PETITIONERS' REPLY TO RESPONDENT'S MOTION TO DISMISS THE GRANTED WRIT OF CERTIORARI

Almost one month after the granting of the Writ, Respondent moves for the Writ's dismissal, premised upon two Court of Appeals decisions rendered long prior to the submission of the Petition for the Writ of Certiorari, but which, " * * * were unknown to counsel at the time Respondent's brief in opposition to the Petition was submitted." (p. 1 Resp. motion). The motion should be denied.

1. Respondent's motion is in contravention of this Court's rule 24-2.

2. Contrary to Respondent's submission, the Sixth Circuit in *Sertic* v. *Cuyahoga Lakes etc., Carpenters' District Council,* 459 F.2d 579, 583, decided May 18, 1972, did not hold that its prior decision in *McCraw* v. *United Association of Journeymen etc.,* 341 F.2d 705, 710, " * * * was not to be looked upon as establishing law on the issue of Section 102 fee awards for that Circuit", as alleged by Respondent, (p. 2 Respondent's motion). In fact, the Sixth Circuit held that courts have differed "widely" on the issue by citing its *McCraw* opinion for, "See General" holdings of courts, (id. 583), thus reiterating its views set forth in *McCraw.* Furthermore, *Sertic* is a "created common monetary fund" issue, with the additional issue as to the amount of attorney fees to be awarded from the created fund of $500,000.00 and due process notice requirements to persons entitled to such fund.

3. As to *Yablonski* v. *United Mine Workers,* 314 F. Supp. 616 (D.D.C. 1970), Respondent fails to mention that the D.C. Circuit, 459 F.2d 1201, decided March 17, 1972, did not reverse on the issue of attorney fees. To the contrary, reversal was solely directed to so much of the District Court's holding which concluded that the death of the plaintiff and the holding of a union election mooted the case. The Circuit, in *per curiam* specifically stated:

> "Neither the holding of the election nor the death of the original plaintiff, rendered moot the claims for actual and punitive damages, or the question of appellants' right to continue the suit in respect of those claims. For this reason, without intimating any view as to the merits of those issues, and without intimating any view as to right of survivorship, we reverse the Order dismissing the complaint as moot insofar as the complaint seeks damages and a right in appellants to continue the suit in that respect, and we remand for further proceedings not inconsistent with this opinion." (id. 1202, 1203)

4. Respondent's motion to dismiss the granted Writ of Certiorari should be denied.

Three copies of this reply have been served upon the attorney for the Respondent.

Respectfully submitted,

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1250 Broadway
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[212] 279-9200

To:

BURTON H. HALL, ESQ.
Attorney for Respondent

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-630

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Petitioners,

v.

JOHN COLE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONERS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-630

PAUL HALL, individually and as President or AL KERR, as Secretary Treasurer, or EARL SHEPARD, as Vice President, or CAL TANNER, as Executive Vice President of the Seafarers International Union of North America—Atlantic, Gulf, Lakes and Inland Waters District,

Petitioners,

v.

JOHN COLE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONERS

Opinions Below

The opinion of the Court of Appeals (A. 5-C. 2a-9a) is officially reported at 462 F. 2d 777. The decision of the District Court (A. 3-C. 10a-21a)[1] is not officially reported

[1] The Single Appendix has been cited herein as "A". Such Single Appendix contains notations where referred to documents are set forth in the Appendix attached to the printed Petition for Certiorari. The reference "C" refers to the Appendix attached to said printed Petition for Certiorari and pages therein.

but is unofficially reported at 66 LC ¶ 11,953. The District Court's supplemental decision and order (A. 3-C. 22a) is not reported. The District Court's findings of fact and conclusions of law (A. 2-C. 23a-39a) is not reported. The District Court's amended findings of fact (A. 3-C. 40a-42a) is not reported. The order of the Court of Appeals denying the petition for rehearing (A. 5-C. 43a) is not reported.

Jurisdiction

The judgment of the Court of Appeals was entered on June 22, 1972. The order of the Court of Appeals, denying a petition for rehearing was entered on July 24, 1972. The petition was filed October 24, 1972, and the writ was granted December 18, 1972. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

Questions Presented

1. Whether a federal court in a Section 102 proceeding, reviewing an expulsion of a member by a union, finding his expulsion in violation of Section 101(a)(2), and directing his restoration to membership, may also award the member's attorney reasonable counsel fees.

2. Whether a federal court in a Section 102 proceeding, in restoring an expelled member to membership, may award reasonable counsel fees when it is found that the member sustained no damages by reason of the expulsion; additionally found that the union in good faith believed it had the right to discipline the member for his conduct; further found no motivation of malice by the union in its discipline of the member and does not find that the member by his conduct acted in good faith, but instead concludes the member's conduct was motivated in part for personal political ambitions.

Statutes Involved

Section 101(a)(2) of the Labor-Management Reporting and Disclosure Act (hereinafter referred to as the "Act"), 73 Stat. 523, 29 U.S.C. § 411(a)(2) provides:

> FREEDOM OF SPEECH AND ASSEMBLY.—Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: *Provided,* That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

Section 102 of the Act, 73 Stat. 523, 29 U.S.C. § 412 provides:

> Any person whose rights secured by the provisions of this title have been infringed by any violation of this title may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be brought in the district court of the United States for the district where the alleged violation occurred, or where the principal office of such labor organization is located.

Section 609 of the Act, 73 Stat. 523, 29 U.S.C. § 529 provides:

> It shall be unlawful for any labor organization, or any officer, agent, shop steward, or other representative of a labor organization, or any employee thereof to fine, suspend, expel, or otherwise discipline any of its members for exercising any right to which he is entitled under the provisions of this Act. The provisions of section 102 shall be applicable in the enforcement of this section.

Statement of the Case

Cole was a member (A. 2-C. 25a) of the petitioner union (hereinafter SIU) which was an affiliate of the Seafarers International Union of North America (A. 2-C. 23a). The SIU since 1940 competed with the National Maritime Union (hereinafter NMU) for membership among unlicensed seamen (A. 2-C. 26a). In 1957 and again in 1962 the NMU attempted to take employment opportunities away from SIU members by raiding SIU's contractual rights aboard Robin Line vessels (A. 3-C. 40a, 41a). By virtue of such contractual rights, employers make contributions to funds to provide pension, welfare and vacation benefits for SIU members (A. 3-C. 40a) and loss of such Robin Line employment opportunities would reduce monies available for such benefits. The SIU in conjunction with allied organizations, undertook successful activities to repel the NMU raid (A. 3-C. 41a).

Thereafter, Cole at a union membership meeting proposed a written resolution condemning SIU's retaliatory action against the NMU and his union's jurisdictional fight with the NMU competing for contractual rights for unlicensed seamen employment opportunities—maintaining *inter alia*, that such activities infringed upon his employ-

ment (shipping) rights and contrary to his philosophical trade union concepts (A. 2-C. 28a, 32a; A. 3-C. 16a). Cole sought membership action to implement his resolution and was unanimously, except for a seconder to his resolution, rejected (A. 2-C. 33a). Subsequent thereto a SIU member, pursuant to the union constitution, filed written charges against Cole for his aforesaid action (A. 2-C. 33a, 34a). After hearing before a membership tribunal in which Cole participated, his expulsion was recommended and concurred in by the union membership and his subsequent appeal was denied (A. 2-C. 34a, 35a). Cole thereafter brought an action in the District Court for an injunction, compensatory and punitive damages and counsel fees (A. 3-C. 10a), asserting such claims under the Act's Sections 101(a)(2), 102 and 609. A preliminary injunction was granted and thereafter affirmed by the Court of Appeals.

After plenary trial of the action, the District Court found, that it may be as the SIU contended that Cole's aforesaid activities would result in a decrease in the number of union jobs available for the union members and would reduce both the union membership and its treasury, nevertheless, Cole's activities were protected under the Act's Section 101(a)(2) and that the proviso in such Section was inapplicable, as the same was not intended to discourage Cole's activities merely because the ultimate result would not benefit the SIU (A. 3-C. 16a).

The District Court however, found that Cole suffered no loss of damages as a result of his expulsion. On the contrary it was found, that Cole's right to employment as well as insurance and welfare benefit rights, remained unimpaired (A. 3-C. 18a), and that prior to the District Court trial, Cole, since 1967, was retired and currently receiving a union pension (A. 2-C. 37a). The District Court further found that Cole failed to prove any other item of compensatory damage such as alleged injury to reputation and accompanying emotional strain (A. 3-C.

18a). The District Court, in rejecting Cole's claim for punitive damages, specifically found that all the defendants in good faith, believed they had a right to charge and discipline Cole for his aforesaid activities, concluding that there was an absence of showing of malice by any of the defendants (A. 3-C. 19a; A. 2-C. 38a). The District Court did not find that Cole in his activities at bar acted in good faith. On the contrary the District Court found Cole's complaints, grievances and accusations were in part, motivated by his political ambitions for union office (A. 2-C. 38a).[2]

The District Court dismissed all of Cole's causes of action against all the individual union officer defendants. The Court, however issued a mandatory permanent injunction against the SIU, directing that Cole be reinstated to union membership but awarded no damages. The Court, however, awarded counsel fees to Cole's attorney in the sum of $5,500 (A. 4). In awarding counsel fees in this Section 102, 609 action, the District Court found authority for the same as enunciated by the majority in *Gartner* v. *Soloner,* 384 F. 2d 348 (3 Cir. 1967), cert. den. 390 U.S. 1040. The Court further concluded that it should not be denied such power to award counsel fees because of the absence of expressed statutory provisions authorizing the same, citing this Court's decision in *Mills* v. *Electric Auto-Lite Company,* 396 U.S. 375 (A. 3-C. 21a).

Petitioners appealed and respondent took no appeal or cross-appeal from the District Court's judgment. The Court of Appeals affirmed (A. 5-C. 2a-9a).

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[2] Prior and similar complaints, grievances and accusations by Cole were found by the District Court, motivated then by his resentment that a college scholarship awarded to his daughter by an entity affiliated with the SIU was revoked, notwithstanding as the court found, such revocation was because she had failed to maintain a B average in accordance with the conditions of the grant (A. 2-C. 25a, 26a).

Summary of Argument

I.

The rule in the United States Courts has long been that attorney fees are ordinarily not recoverable in the absence of a statutory or contractual provision allowing thereof. *The Fleischmann Distilling Corporation* v. *Maier Brewing Co.*, 386 U.S. 714. The Act's comprehensive scheme of regulation of the internal affairs of labor organizations and the Congressional legislative history, demonstrate that where Congress intended to authorize counsel fee awards for violation of federally created union member rights, it so specifically stated.[3] Section 102 does not so specifically provide. Nor as the legislative history shows, ever intended. Further, such legislative history demonstrates a legislative scheme to foster democratically run unions taking into account the special problems and functions of unions, but that consistent therewith, remedies should not be provided which could undermine union self-government nor weaken them in their role as collective bargaining representatives.[4] The imposition of attorney fee awards in successful 102 actions against unions, not specifically authorized by Congress, would frustrate the aforesaid latter objective.

The Act's Section 102 constitutes a specifically Congressional created private right as distinguished from a judicial implied private right derived from a Congressional determination to consider certain activities improper and thus void, with the need to fashion relief for violation of

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[3] The Act's Title II Section 201 (c), 29 U.S.C. 431 (c); Title V Section 501 (b), 29 U.S.C. 501 (b), *infra*.

[4] S. Rep. No. 187, 86th. Cong. 1st Sess., 5, (1959). U.S. Code Cong. & Admin. News, p. 2322, *infra*.

such implied private right, *Mills* v. *Electric Auto-Lite Company*, 396 U.S. 375. Nor present is the creation of a monetary fund or increase in value of held personal property so as to create an exception to the application of the long standing rule set forth in *Fleischmann, supra.* Nor should unions, non-profit associations of workers, in the overwhelming majority with limited income, have their monies subject to the imposition of counsel fees for violation of a fellow member's federal created right upon the concept of therapeutic value, unless such authority is expressly so stated by the legislature, a condition not present with respect to a Section 102 action.

II.

Congress and the courts have demonstrated that monetary awards against union treasuries shall be limited and drawn with great caution to assure the stability of labor unions and avoid the frustration of expressed national labor policy, *Linn* v. *United Plant Guard Workers,* 383 U.S. 53; *Vaca* v. *Sipes,* 386 U.S. 171; *Teamsters Local 20* v. *Morton,* 377 U.S. 252. Assuming arguendo Section 102 authorizes a discretionary award of counsel fees in a successful Section 102 action, nevertheless such award is not proper, unless appropriate conduct is found so as to accommodate to the Congressional and courts concern expressed in the aforesaid decisions.

An attorney's fee award in a successful Section 102 action is not proper unless the suing union member has acted in good faith. The treasury of union members should not be the source of lawyers fees absent a finding of good faith conduct of a suing member in pursuit of his rights under Title I of the Act. The Act creating a member's Title I rights, carries with it as a concomitant the requirement that the member act in good faith.

Furthermore, given the history and nature of a union, an association of workers, promulgating their rules of order and society by adopting a constitution and by-laws mandated by the Act's Section 201(a),[5] with provisions for regulating the conduct of members and the self government administration thereof, an award of counsel fees in a successful Section 102 action is not proper, unless it is found that the union acted arbitrarily, capriciously or maliciously in disciplining the member, *Linn, supra, NLRB* v. *Allis-Chalmers Manufacturing Co.*, 388 U.S. 175, 195. An attorney's fee award under such circumstances would contravene Congress' concern, "not to undermine union self government", *Allis-Chalmers, id.* 194. For exposure to attorney fee awards by reason of negligent or erroneous but good faith disciplinary proceedings would discourage self union government regulation. Equally, such result would be totally at variance with this Court's holding in analagous treatment of members' and unions' rights and obligations, that good faith union conduct precludes the award of monetary damages to a member and his attorney against the member's union. *Vaca, supra.*

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[5] Section 201(a): Every labor organization shall adopt a constitution and by-laws and shall file a copy thereof with the secretary, together with a report signed by its president and secretary or corresponding principal officers, containing the following information—
* * *

(5) (I) imposition of fines, suspensions, and expulsions of members, including the grounds for such action and any provision made for notice, hearing, judgment on the evidence, and appeal procedures.

ARGUMENT

I.

The Act's legislative history and it's Section 102 demonstrates that Congress did not authorize the award of counsel fees in a member's successful Section 102 suit against his union for violation of his Section 101(a) rights. Nor may the courts, absent such statutory authority, create Judge exceptions to award counsel fees.

As this Court has held, in the absence of a statute or enforceable contract so providing, the American rule as distinguished from the English rule, is that attorney fees are not ordinarily recoverable by successful litigants, *Fleischmann, supra.* Section 102 as distinguished from other remedial Sections of the Act, to wit, Sections 201(c) and 501(b) cited and discussed *infra,* does not provide for or authorize the award of attorney fees to successful litigants. There is an absence of statutory authority.

A. Legislative History.

The Act represents a comprehensive Congressional scheme, most intricate and complex, regulating an extensive range of internal union affairs. It began its course in the 86th Congress in March, 1959 as S. 1555[6] and was finally enacted in September, 1959. The debate and discussion was most extensive as witness two volumes Leg. Hist. Its six Titles provide for comprehensive multiple federal rights, obligations and remedies, primarily for union mem-

[6] S. Rep. No. 187, 86th Cong. 1st Sess., NLRB Legislative History of the Labor Management Reporting and Disclosure Act of 1959, Volume I, p. 397 (1959). (This two volume publication is hereinafter referred to as "Leg. Hist.")

bers and their unions with the fashioning of a detailed scheme regulating specific conduct and providing specific remedies. Such elaborate legislative scheme makes clear, as hereafter demonstrated, that where Congress determined to provide authority for the award of and recovery of counsel fees, it had no hesitation in so expressly stating. Similar expressions however, were not made by Congress, relative to authority to award counsel fees in Section 102 actions. In fact as discussed hereafter, the absence of such authority was specifically called to the Houses' attention during its deliberations, but notwithstanding the same, Congress failed to authorize such awards.

The legislative history, although relatively sparse on the issue of "relief (including injunctions) as may be appropriate" under Section 102, nevertheless, such history as is available demonstrates Congressional intent not to authorize attorney's fees under Section 102 provisions.

In the judicial search of legislative history, in the endeavor to gleam or determine the legislative intent, the primary weight should always be given to the views expressed by the sponsors of the bill. *National Woodwork Manufacturing Ass'n.* v. *N.L.R.B.* 386 U.S. 612. It is unquestioned that the prime sponsors of the Act in the House, were Congressmen Landrum and Griffin. Congressman Griffin, in referring to the Act's Section 609, which provides that Section 102's remedies shall be applicable—incorporates them, stated:

> "(c) Section 607 of the Senate-passed bill which provided criminal enforcement of rights guaranteed under the Act was stricken by the House committee. The substitute—in sections 609 and 610—restores the sense of the Senate provision but makes it clear that criminal sanctions apply only when rights are denied through the use of force or violence."[7]

[7] 105 Cong. Rec. 13088 [daily ed.]; II Leg. Hist. 1519.

Thereafter Congressman Griffin in the Congressional debate, turning to a detailed analysis of the Act, stated:

> "Section 609 (denial of rights through discipline): The Senate-passed bill (S. 1555) contained a criminal enforcement provision (sec. 607) which was stricken out by the House committee. (Paragraph (a) of that section 607 would have made it a crime for any labor organization, or its agents, to fine, suspend, expel, or otherwise discipline a member for exercising rights guaranteed by the act). The substitute bill provides that denial of such rights through union discipline shall be unlawful; however, unlike S. 1555, the substitute provides for civil, rather than criminal, enforcement. In our judgment, the conduct prohibited by this section is generally comparable to conduct described as an unfair labor practice under the Taft-Hartley Act and, accordingly, we do not believe that criminal sanctions are warranted." [8]

The conduct which the Act's sponsors prohibited was in their judgment comparable to unfair labor practices under the Taft-Hartley Act (29 USC Sec. 141 *et seq.*). By tracking the Act's prohibited conduct (other than those specifically made criminal) with unfair labor practices, by equating both, the Act's sponsors were setting forth the Congressional scheme as to the prohibited conduct and the comparable appropriate remedies. Certainly there cannot be imputed to the Act's sponsors an ignorance of the remedial provisions contained in the Taft-Hartley Act. Equally, in the light of the comparable conduct sought to be prohibited, unfair labor practices and rights of members established by the Act, there should not be found, absent expressed language to the contrary, a Congressional intent to prescribe substantially different remedies. On the contrary, the converse would be impelled—the same remedies. Taft-Hartley's remedial provisions provides that the NLRB:

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[8] 105 Cong. Rec. 13091 [daily ed.]; II Leg. Hist. 1522.

> "* * * shall issue an order requiring such person to cease and desist from such unfair labor practice, and to take affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act:" (Section 10(c)).

Such NLRB remedy encompasses injunctive relief as well as monetary damages to the employee to the extent of his lost wages and does not permit of other monetary remedies. *Republic Steel Corp.* v. *NLRB,* 311 U.S. 7 (1940). Conduct comparable to unfair labor practices which the Act's sponsors sought to prohibit, implicity carries with it the Congressional intent to apply comparable remedies absent expressed language to the contrary such as in Sections 201(c) and 501(b) of the Act, *infra.* And discipline by a union of a member, allegedly in violation of the exercise of Section 101(a)(2) rights of expression and conduct in support thereof is most comparable, if not the counterpart of employer discipline of an employee for exercise of his Section 7 rights provided in the Taft-Hartley Act and an unfair labor practice under Section 8(a)(3) of that Act.

The foregoing Congressional intent to apply comparable remedies to comparable conduct which Congress sought to prohibit, becomes most manifest when further examination is made of Congressional remarks.

Senator Goldwater, an advocate of a bill more stringent than that eventually passed and now constituting the Act, directed his remarks as to what he considered weaknesses in the Act. Zeroing in on the remedy provided for violation of a member's rights guaranteed by Title I of the Act, he stated:

> "Although the bill permits the union member himself to sue for infringement of his rights, the nature of the suit is such as to promise, even if successful, little in the way of monetary damages except in the rare case where the plaintiff's job rights or job tenure have been adversely affected. Moreover, the bill does not grant him, even where successful in his suit, reasonable counsel fees or other

> costs. It thus forces him to assume the entire financial burden of the litigation. For an ordinary rank-and-file union member who is generally a wage worker, such a litigation thus becomes an impossible financial burden. In recognition of these difficulties, the Fair Labor Standards Act, for example, requiring the payment of minimum wages and premium overtime pay for certain categories of workers, permits not only the worker himself to bring a suit for non payment (which he may do in the State as well as the Federal courts) and to recover attorney's fees and court costs if successful, but if the worker prefers, he may have the Secretary of Labor bring such suit in his behalf.[9]

Similar to Senator Goldwater's remarks is the House Minority Report on the Act, H.R. Rep. No. 741, 86th Cong. 1st Sess. (1959), U. S. Code Cong. & Ad. News 1959, p. 2424:

> "One of the most serious inadequacies of the Senate bill is the lack of any effective enforcement procedure to protect union members from those few union officials who fail to recognize that a union belongs to its members. Under the bill the individual member must shoulder the burden of litigation costs himself. The union officer (sic), on the other hand, have the entire resources of the union at their disposal. This impractical enforcement method is weakened still further in the committee bill."

The Act at bar originated with the reporting of the Kennedy-Ervin Bill to the Senate by the Committee on Labor and Public Welfare, in April, 1959, *supra*. Such bill however, did not contain provisions, euphemistically thereafter characterized as bill of rights. A few days thereafter Senator McClellan proposed an amendment to the Kennedy-Ervin bill, which provided for members' bill of

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[9]Analysis of S-1555 passed by the Senate, in his testimony before the House Committee On Education and Labor deliberating the Bill, June 8, 1959. 105 Cong. Rec. 9109 [daily ed.]; II Leg. Hist. 1281.

rights. The enforcement Section of such amendment provided:

> "Sec. 102. Any officer or agent of any such labor organization who, through use or abuse of authority, or through failure to discharge the duties of his office, or otherwise, willfully interferes with or prevents, or attempts to interfere with or prevent, the exercise by any member of a right to which such member is entitled under the provisions of section 101 shall be fined not more than $10,000 or imprisoned for not more than two years, or both.
>
> Sec. 103. The Secretary, whenever it shall appear that any person has violated or is about to violate any of the provisions of this title, may bring an action in a district court or other court of the United States for such relief as may be appropriate including, but without limitation, injunctions to restrain any such violations and to compel compliance with this title. Any such action against a labor organization may be brought in the United States District Court for the District of Columbia or in the district court or other court of the United States where the violation occurred or is about to occur." [10]

It is most significant to note that Section 103 of the McClellan amendment was the same language contained in the enforcement provisions provided for under Title II, Section 210 and Title III, Section 304(a).

Thereafter, serious concern was expressed as to the enforcement provisions of Section 102 in that bureaucratic chaos might result if the Secretary was required to initiate and process all complaints on behalf of union members. [11] To dispel such fears, Senator Kuchel offered an amendment removing the Secretary of Labor as the sole person to seek relief in federal courts and instead gave that right directly

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[10] 105 Cong. Rec. 5810, [daily ed]; II Leg. Hist. 1102.

[11] Id, at 5819-5822; Id. at 1111-1114.

to the aggrieved union member. The Kuchel amendment became the version ultimately adopted by the Senate, and states:

> "Any person whose rights secured by the provisions of this title have been infringed may bring an action in a district court of the United States for such relief as may be appropriate. Any such action against a labor organization shall be brought in the United States district court for the district where the alleged violation occurred, or where the headquarters of such labor organization is located." [12]

The only substantial alteration of the Kuchel amendment was the subsequent parenthetical insertion of the words "including injunctions", to insure that at least an injunction would be considered appropriate relief under the Act. *Gartner* v. *Soloner, supra,* at p. 350.

It is most apparent from the foregoing that at no time did Congress intend reasonable counsel fee awards to be authorized pursuant to Section 102. The legislative history aforesaid contains no authority for any conclusion which would authorize the award of attorney fees. It is further clear that only the Secretary of Labor was contemplated to be the sole authority authorized to enforce the provisions and certainly it cannot be maintained or inferred that Congress intended the Secretary to be awarded attorney fees, for, as noted, the Kuchel amendment was solely to remove the fears of bureaucratic chaos and nothing else. When Congress intends to allow recovery of attorney fees in statutory actions, it has no difficulty in so expressly stating, as witness, *Fleischmann, supra,* at 721, fn. 17.

The foregoing concept is equally present in the Act at bar. For when Congress determined in the Act to authorize reasonable attorney fees, it so specifically

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[12] 105 Cong. Rec. 5998 [daily ed]; II Leg. Hist. 1221.

stated, as in the Act's Section 201(c) and 501(b).[13] To imply a Congressional intent that the federal courts may award attorney fees in Section 102 actions, absent specific authority in the Act, where other Sections of the same Act contain such specific authority, *supra,* would constitute an aborting of Congressional intent, and substitute a judicial judgment for a Congressional judgment. Such conduct would expressly override accepted judicial doctrine utilized for finding the manifestations of Congressional intent, set forth so clearly in *Fleischmann* at 721, fn. 17, *supra.*

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[13] Sec. 201(c) Every labor organization required to submit a report under this title shall make available the information required to be contained in such report to all of its members, and every such labor organization and its officers shall be under a duty enforceable at the suit of any member of such organization in any State court of competent jurisdiction or in the district court of the United States for the district in which such labor organization maintains its principal office, to permit such member for just cause to examine any books, records, and accounts necessary to verify such report. The court in such action may, in its discretion, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.

Sec. 501(b) When any officer, agent, shop steward, or representative of any labor organization is alleged to have violated the duties declared in subsection (a) and the labor organization or its governing board or officers refuse or fail to sue or recover damages or secure an accounting or other appropriate relief within a reasonable time after being requested to do so by any member of the labor organization, such member may sue such officer, agent, shop steward, or representative in any district court of the United States or in any State court of competent jurisdiction to recover damages or secure an accounting or other appropriate relief for the benefit of the labor organization. No such proceeding shall be brought except upon leave of the court obtained upon verified application and for good cause shown, which application may be made ex parte. The trial judge may allot a reasonable part of the recovery in any action under this subsection to pay the fees of counsel prosecuting the suit at the instance of the member of the labor organization and to compensate such member for any expenses necessarily paid or incurred by him in connection with the litigation.

B. The Union Structure and Status.

Manifestly, Congress was not ignorant at the time of its deliberations leading to the Act's adoption, of the structure and status of unions—their constituencies and functions and the further fact that the overwhelming majority were honestly and democratically run, with the revealed abuses confined to but a few unions. In fact, Congress so concluded, Sen. Rep. No. 187, 86th Cong. 1st Sess., 5 (1959), U.S. Code Cong. & Admin. News p. 2322.

Historically, unions constitute an association of workers, banded together for their economic and social betterment. They adopt their own constitutions and by-laws to govern the conduct of their members which includes the union's right to discipline a member for violations of such self adopted laws. The right to discipline is critical to the union and its members, for unions constantly face threat of loss of members and employment opportunities to other unions or to non union status. It is imperative, that unions maintain the contractual obligations with their members employers, and stability for the union as an institution. To secure and protect their membership and institutional interests as aforesaid, it is necessary as in any healthy society, to discipline the breaker of the rules. Absent such disciplinary authority, the union's very viability is most seriously threatened with the most adverse consequences to its members, as history has conclusively demonstrated,[14] see *N.L.R.B.* v. *Allis-Chalmers Manufacturing Co.*, 388 U.S. 175, 181, 182.

Government statistics further conclusively demonstrate that the overwhelming majority of unions are most modest

[14] See: Prof. Smythe, Assistants Schwab and Madigan, University of Minnesota; Individuals' Procedural Rights in Union Disciplinary Acts; CCH, Labor Law Journal, April 1967 at 266.

in numbers and financial resources, each undertaking within the framework of their limited means, the discharge of the aforesaid functions and responsibilities as associations of working men and women. Most significant is the fact that disciplinary proceedings against members are instituted by fellow members of the union and administered by the union, pursuant to constitution and by laws, which as mandated by Section 201 (a) *supra,* they are required to adopt, and which include provisions for the initiation and holding of such disciplinary proceedings. Nor may the union, eschew a member's filing of a charge against another member and the hearing and determination of such charge, without abridging its constitution or by laws and being liable therefor. For such constitutions and by laws historically constitute contractual obligations by and among the union, its members and officers. *Polin* v. *Kaplan,* 257 N.Y. 277; 177 N.E. 833. Equally significant is that unions and particularly local unions, because of their limited financial resources are not in a position to, nor do they generally undertake the elaborate and costly process so familiar in public judicial proceedings—such as expensive official transcriptions of hearing proceedings.[15] For as expressed *supra,* the constituency is generally small, its proceedings conducted by working members in a general and reasonable informal manner.[16] Certainly the Act was not intended to weaken their viability with a yoke of expensive if not prohibitive trappings, Sen. Rep. No. 187, *supra.*

As demonstrated by U. S. Department of Labor studies for the years 1963-1966, there were less than 51,000 unions in the United States of which no less than 48,000, or 94% were local labor organizations, the remainder being a overwhelming majority of intermediate bodies and the balance

[15] *International Brotherhood of Boilermakers* v. *Hardeman,* 401 U.S. 233, fn. 15.

[16] *Id.*

national or international unions.[17] Further U. S. Department of Labor studies demonstrate that in 1960 approximately 84% of such 94% of total unions, had receipts of less than $25,000 per annum.[18] The foregoing facts as to the financial conditions of unions in 1960 and which obviously did not vary to any appreciable degree from 1959, was the status during Congress' deliberations of the Act.

Sen. Rep. No. 187 *supra,* which this Court has found summarizes Congress' general objectives of the Act,[19] states, "A strong independent labor movement is a vital part of American institutions*** (and), (T)he Senate should be careful neither to undermine self government within the labor movement nor to weaken unions in their role as bargaining representatives of employees". With 94% of the American labor movement constituency located in local unions and 84% of such local unions receiving receipts of less than $25,000 per annum to administer the totality of their members and institutional interests, and such institutions not their affiliated nationals or internationals, being required by custom, practice and law to process and determine disciplinary proceedings initiated by their members, it is most readily discernible therefrom, that Congress consistent with its aforesaid general objectives, never intended to subject the most limited financial resources of local labor organizations to imposition of attorney fee awards for improper disciplined members. On the contrary, when it so intended, Congress specifically provided, as witness the provisions of Sections 201(c)

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[17] Union Financial Statistics 1963-1966, U.S. Department of Labor, Labor Management Services Administration, February 1969, Tables 1 through 5.

[18] Union Financial Statistics 1960-1970, U.S. Department of Labor, Labor Management Services Administration, October 1972, Table 7, p. 26.

[19] *Hodgson* v. *Local 6799 United Steelworkers of America,* 403 U.S. 333, 338.

and 501(b). Congress struck the balance and opted for its general objectives aforesaid.[20] As expressed by an oft cited authority, as to Congress' intent and objective manifest by the Act, (it) "****clearly wished to create limits on the exercise of union authority without vitiating a labor organization's essential strength".[21] And depleting a local union's most limited treasury to pay an improper disciplined fellow member's counsel fee, would most seriously weaken, undermine and vitiate the local union's organizational and representative essential strength.

C. Courts of Appeals And Other Authorities Are in Conflict As To Section 102 Authority To Award Counsel Fees.

1. Opinions and decisions determining no authority to award counsel fees in successful Section 102 actions.

The Sixth Circuit in *McCraw* v. *United Association of Journeymen, etc.*, 341 F. 2d 705, 710 (1965), concurred with the District Court's holding that, in a successful Section 102 proceeding which established a violation of the member's Section 101(a)(2) rights, no authority is presented for the allowance of attorney fees for, "The Legislative history of this statute (Section 102) * * * reflects that the bill was so interpreted at the time of its enactment", citing Senator Goldwater's testimony before the House Com-

[20] It is to be noted that a disciplined member seeking reinstatement pursuant to Section 102, is not precluded from utilizing pendant jurisdiction to sue any individual, officer or person as well for a cause of action alleging such officer's or person's malevolent or abusive activities against him, resulting in loss of his membership and if successful, recover attorney fees reasonably incurred. cf. *Salzhandler* v. *Caputo*, 316 F. 2d 445, 451 (2 Cir.) cert. den. 373 U.S. 943.

[21] Prof. Thomas G. S. Christensen, NYU Law School; "Union Discipline Under Federal Law: Institutional Dilemmas in an Industrial Democracy." NYU Law Review, Vol. 43 No. 2, April 1968, 227, 278.

mittee *supra*, then having the Senate Bill (S 1555) before it for consideration. Thereafter the Sixth Circuit in *Sertic* v. *Cuyahoga, Lake etc., Carpenters District Council*, 459 F. 2d 579 [1972], involving *inter alia*, an issue of the amount of an attorney fee allowance from a fund of approximately half a million dollars created as a consequence of an increase in members' dues, found in a Section 102 action to be in violation of the Act's Section 101(a)(3), held, "This issue was not litigated in the District Court, and it can best be decided after findings of fact and conclusions of law have been entered there," *id.* 583. Nevertheless, the Circuit noted, that attorney fees are not mentioned in Section 102 and further noted that whether attorney fees may be allowed under the District Court's general powers, "* * * has produced answers which differ widely, depending upon the statutory language and the factual circumstances", citing to "generally", *Sprague* v. *Ticonic National Bank*, 307 U.S. 161, *Fleischmann, McCraw* and *Gartner, supra, id.* 583.

It is clear from the foregoing, that the Sixth Circuit has adhered to its *McCraw* holding, *supra*. It is equally most significant, that at bar we are not dealing with any "created common monetary fund" for attorney fees, or as in *Sprague, supra*, a "quasi created common monetary fund" affording a discernible class of persons to collect monies upon similar claims as a result of *Sprague's* success, see *Fleischmann, supra* at 719. Such extraordinary circumstances are not present at bar. Nor should Courts as done below at bar, utilize alleged court powers, to change the long established American rule relative to attorney fee awards, reiterated in *Fleischmann, supra*. And most paramount, not to change Congress' intent and legislation, *supra*.

In *Gartner supra*, a majority reversed the District Court's conclusion, that in a successful Section 102 action establishing violation of a member's Section 101(a)(2)

rights, attorney fees are not awardable. We discuss hereafter in detail the majority opinion. The *Gartner* minority however would have affirmed the District Court. The minority's decision is premised upon this Court's expression in *Fleischmann, supra,* that ordinarily counsel fees are not recoverable as damages. In support, the minority cited the legislative history *supra,* of the Congressional developments resulting in the enactment of the Act's Section 102. Commencing with the original Kennedy-Ervin bill in the Senate, and the amendment to such bill by Senator McClellan, it pointed out that in the McClellan amendment the sole authority to institute Section 102 proceedings was the Secretary of Labor. That the Kuchel amendment to the McClellan bill was adopted solely because of the concern that bureaucratic chaos might result if the Secretary of Labor was required to initiate all complaints. The minority concluded that the Secretary obviously would not be entitled to counsel fees and thus it would appear, that counsel fees were never intended by Congress to be authorized by Section 102's enforcement provision, to wit, "• • • such relief • • • as may be appropriate." Further in support of its conclusion the minority stated • • •, "indeed, all Congressional comment contained in the Legislative history is to the contrary", citing Senator Goldwater's remarks and the Minority House Report, *supra,* 384 F. 2d at 356-7.

In accord with the *Gartner* minority, is the minority in *Kerr* v. *Screen Extras Guild Inc.,* 466 F. 2d 1267 (9 Cir. 1972), mentioned *infra.* Numerous District Courts have also concluded that attorney fee awards are not authorized in successful Section 102 actions.[22]

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[22] *Vars* v. *International Bro. of Boilermakers etc.* D. Conn. 1963, 215 F. Supp. 943, 952, aff'd. on a different issue, 2 Cir. 1963, 320 F. 2d 576; *Cole* v. *Hall,* E.D.N.Y. 1964, 35 FRD 4, 8, same case at bar prior to trial. However upon trial, the court advised that after consultation with brother Judge and his consent, Cole's claim for an

2. Opinions and decisions determining authority to award counsel fees in successful Section 102 actions.

The lead case, cited by other courts, which have concluded that Congress authorized attorney fee awards in Sections 102 and 609 proceedings is the Third Circuit's *Gartner* holding, *supra.*

The *Gartner* majority at the outset recognized that the only circuit court which had to then passed upon the instant issue of attorney fee awards in Section 102 proceedings, was the Sixth Circuit in *McCraw, supra.* With respect to the same the *Gartner* majority stated:

> "On appeal the Sixth Court affirmed the District Judge's finding" * * * that no provision is made for the allowance of attorney's fees in an action under Section 101 or 102 of the Act. * * *." *McCraw* v. *United Ass'n of Journey, & App. of Plumbing,* 341 F. 2d 705, 710 (6 Cir. 1965). *Id.* 350.

The Court majority rejected the remarks contained in the Minority House Report, *supra,* as well as those of Senator Goldwater, *supra,* noting that, neither of those communications were voiced as part of the floor debate on the Act in either the House or Senate, Id. 351, footnoting their (the court's) comments. The majority consequently characterized such report and remarks not appropriately legislative history to discern the Congressional intent. We respectfully submit that such conclusion is erroneous and constitutes an unfounded precept. Senator Goldwater's

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attorneys fee award would be reinstated and determined. *Leonard* v. *M.I.T. Employees' Union,* D. Mass. 1964, 225 F. Supp. 937; *Magelseen* v. *Local Union* 518, Operative Plasterers, W.D. Mo. 1965, 240 F. Supp. 259; *Jacques* v. *Local 1418 International Longshoremen's Association,* E.D. La. 1965, 246 F. Supp. 857, 859; *Bailey* v. *Netter,* E.D. La., 1967, 266 F. Supp. 165 and *Yablonski* v. *United Mine Workers,* D.D.C. 1970, 314 F. Supp. 616, reversed on different issue, D.C. Cir. 1972, 459 F. 2d 1201.

statement (*supra* p. 13, 14) constitutes his testimony before the House Committee on Labor & Education after the Kuchel amendment *supra*, passed the Senate. Senator Goldwater was then explaining the Kuchel amendment to the House Committee. Senator Goldwater's testimony aforesaid was specifically found by this Court as the appropriate legislative history, *Hardeman, supra*, 401 U.S. at 244. An examination of the legislative history conclusively demonstrates that Senator Goldwater's aforesaid testimony was given on June 8th, 1959 at which time he made his above statements relative to Section 102 and relative to Section 101(a)(5), the later under review in *Hardeman, supra*. As to the Act's Section 102 the Senator's testimony is contained in 105 Cong. Rec. 9108 (daily ed.), II Leg. Hist. 1280, and as to Section 101(a)(5), the Senator's testimony is contained in 105 Cong. Rec. 9109 (daily ed.), II Leg. Hist. Contrary to the Third Circuit majority's conclusion, Senator Goldwater's testimony is the proper legislative history. It is unquestioned, this Court has so found, *Hardeman, supra*.

The Gartner majority then cited the comments of Congressmen Elliott and O'Hara.[23] Concluding, in accordance with *National Woodwork, supra*, "* * * primary concern should always be given to the views expressed by the sponsors of the bill and in this respect the statements of Senator McClellan and Rep. Elliott should be looked to as representing the true spirit of Section 102." Id. 353.

However, as the majority notes, the Elliott bill was rejected and the bill eventually passed by the House was the Landrum-Griffin bill. The majority's error is in its failure to observe its own rule, to wit, to look to the

[23] The majority's citation of Representative O'Hara's comments at p. 353, failed to state that such were made in support of the rejected Elliott bill, 105 Cong. Rec. 14357 [daily ed.]; II Leg. Hist. 1633, and made at a time that the Landrum-Griffin bill was before the House; See Rep. Griffin statements, 105 Cong. Rec. 13088, 13091 [daily ed.]; II Leg. Hist. 1519, 1522. Id. 352, 353.

comments of the sponsors of the Landrum-Griffin bill as representing the true spirit of Section 102. For as we have demonstrated, *supra*, Representative Griffin's views furnish no basis to conclude that there is Congressional authority for award of attorney fees. On the contrary, the conduct sought remedied was comparable to Taft-Hartley unfair labor practices and consequently intent for comparable remedies. Similarly, as to the statements of Senator McClellan as representing the true spirit of Section 102. As the *Gartner* minority *supra* expressed, in accord with the majority, and as our discussion of Senator McClellan's amendment equally express, the Senator's amendment constituted no rational basis to conclude that attorney fees were authorized. On the contrary, it's relief provisions, limited to their exercise by the Secretary of Labor, compels the conclusion that attorney fees were never intended or authorized. To conclude otherwise, would mandate that Congress authorized the courts to award attorney fees to the Secretary of Labor, a result most far fetched, if not inconceivable. Similarly, the majority's reliance upon *Johnson* v. *Nelson*, 325 F. 2d 648 (8th Cir. 1963), is inappropriate. *Johnson* was a proceeding pursuant to the Act's Section 501(a) and (b) where Congress expressly authorized the award of counsel fees. The *Johnson* court's comments as to Section 102, not relative or necessary to their determination, sans exhaustive study, review and analysis of the legislative history, and made prior to the *Fleischmann* holding, *supra*, is at the best purely gratuitous dicta.

The *Gartner* majority, apparently in an endeavor to explain away Congress' failure to expressly provide authority for attorney fee awards, held that it was because of:

> "• • • in the heavy pressure atmosphere attending the creation of the Labor Management bill of rights legislation there was a manifest reluctance to specifically detail the individual's right to reimbursement

> for counsel fees expended in defeating his union's effort to deprive him of his fundamental rights as a member. Nevertheless, the Congress was successful in protecting that right by giving such union member "appropriate relief". That phrase, while it avoided spotlighting the making available of necessary material assistance to a single unionist fighting his lonely battle for justice, did take care of the situation by means of the deliberately general language used. In the clear light of the latter, if the Congress had concluded to reverse its field and tear up the bill of rights it had drafted, it would have stated that there would be no counsel fees allowed. Absent this, "appropriate relief" fairly construed must be held to include proper counsel fees." Id. 355.

It is most respectfully submitted that the foregoing does not demonstrate a search for legislative intent. It is, we respectfully submit, an interpretation premised upon conjecture, not a judicial search for the requisite intent of Congress. The court's opinion first creates a "heavy pressure atmosphere" without explication upon such phrase. It then attributes to Congress "a manifest reluctance to specifically detail an individual's right to reimbursement for counsel fees * * *." If further attributes to Congress the utilization of the term "appropriate relief", as the authority for attorney fee awards, in order to "avoid spotlighting". Why such heavy pressure atmosphere, reluctance and spotlight avoidance did not preclude Congress from expressly authorizing attorney fee awards in other Sections as demonstrated *supra*, is never explained. Most significant is Section 609. It provides that Section 102's enforcement provisions shall be applicable to it in enforcement proceedings to remedy a violation of a member's right under any provisions of the Act. It is not limited to the bill of rights legislation. Yet, by the court's holding, premised upon "heavy pressure atmosphere", attorney fee awards by virtue of Section 609 are applicable to remedying all rights, not solely those set forth in the bill of rights, concerning which, the court concludes such, "heavy pressure atmosphere" was only applicable.

We again most respectfully submit, that the acceptance of such criteria, the utilization of such nebulous, ephemeral and subjective standards for judicially determining Congressional intent, would render the task impossible of objective performance. It would be contrary to the criteria and long established doctrine set forth in *Fleischmann, supra.* Such conduct, if authorized, would judicially usurp functions of Congress.

In addition to the Third Circuit's holding in *Gartner,* the Fifth Circuit has also passed upon the same issue. In *Burch* v. *International Assn. of Machinists,* 454, F. 2d 1170 (1972), the Fifth Circuit, in a per curiam decision held:

> "The judgment of the district court, 337 F. Supp. 303 is affirmed. See Local Rule 21. That court's finding that the termination of Burch's membership was arbitrary and discriminatory is not clearly erroneous. Moreover, the district court properly construed the "appropriate relief" provision of the Landrum-Griffin Act to permit the award of attorney's fees in this case. 29 U.S.C. § 412; *Gartner* v. *Soloner,* 3 Cir. 1967, 384 F. 2d 348, cert. den'd 390 U.S. 1040, 88 S.Ct. 1633, 20 L. Ed. 2d 302."

The Ninth Circuit majority in *Kerr supra,* in reliance upon the Gartner majority rational, is in accord with Gartner.

The Second Circuit in the case at bar, affirmed in part upon the *Gartner* authority, *supra,*[24] perpetuating the conflict among and between the courts. As to the application of the *Fleischmann* holding, and the fact that Congress expressly authorized attorney fee awards in some Sections

[24] The Court concluded that the Sixth Circuit's *McCraw* holding is not contrary to *Gartner,* although oft so cited, as an examination of that case "reflects that the court * * * did not specifically pass on Section 102, but instead considered Section 431(c)" Id. 780. We respectfully submit that the court is in error. *Gartner, supra,* expressly states otherwise, so does a close reading of *McCraw* as well as the Sixth Circuit's reaffirmation in *Sertic, supra.*

of the Act and not others, the court characterized it as a "non sequitur here", stating:

> "These sections have to do with narrowly defined remedies such as the examination of books and records and an accounting. Here the relief necessary cannot be as easily foreseen nor broadly specified which accounts for the unlimited language of the Congress in § 102 i.e. 'such relief as may be appropriate'." 462 F. 2d at 781.

Section 401(c) equally has to do with narrowly defined remedies such as the right to inspect membership lists and for campaign literature to be mailed at a member's expense. Yet Congress did not provide for attorney fee awards there as they did for remedies under Section 201(c) and 501(b). No explanation is proferred by the Second Circuit of Congress' different remedy treatment for these same narrowly defined remedies.

Interpreting the Act in the manner performed by the Second Circuit, *supra*,[25] is contrary to the Act's legislative history and to the historic doctrine in the United States relative to award of counsel fees in statutory causes of action, expressed in *Fleischmann, supra.*

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[25] The Court notes that plaintiff's counsel was "largely on a pro bono publico basis". Id. 780. The record demonstrates the finding that counsel was assigned *Civil Liberties Union* counsel whose services were gratis (A. 2). As to the Court's comments that Cole's preliminary injunctive relief required six months, "largely because of the dilatory action of the union and its officers", Id. 780—there is no support in the record, let alone evidence to justify such statements. Significantly and most unusual, the Court fails to discuss, take notice or even mention the trial court's findings, *supra*, that the union and its officers acted in good faith, without malice and the court's failure to find that Cole's conduct was in good faith, but on the contrary, found his conduct motivated in part by political ambitions for office. As to the Court's observation of "* * * unions' propensity to deprive members of their rights of free speech", the Congressional conclusion is otherwise, see Sen. Rep. *supra* fn. 4, *Hodgson supra* at 338, fn. 19 *supra*.

Various District Courts have followed or are in accord with the *Gartner* majority holding.[26]

D. The *Fleischmann* and *Mills* Holdings.

Fleischmann supra, reaffirmed the rule in effect in American Courts since 1796,[27] "* * * that attorney fees are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefor." *The Gartner* majority and their progeny although apparently observing allegiance to such rule, nevertheless bring about a result, the effect of which would abridge the aforesaid rule. For by undertaking the task of interpreting the statute and in the endeavor resorting to the utilization of subjective tests of Congressional "heavy pressure atmosphere", never explicated upon, and attributing to Congress a "manifest reluctance" to state what it authorized in order to, and again subjectively "avoid spotlighting", the result is that the above most historical rule is changed not by Congress but by the courts, so as to allow recovery of attorney fees in a statutory cause of action, notwithstanding no Congressional provision for the same. Such we respectfully submit is error.

Fleischmann made clear that although Judge exceptions have been made to the rule over the years, such exceptions have been confined to non statutory actions, "when overriding considerations of justice seemed to compel a result", *id.* 718, or in a civil contempt proceeding for "wilfull disobedience of a court order", *id.* 718. Further ex-

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[26] *Sands* v. *Abelli* S.D.N.Y., 1968, 290 F. Supp. 677; *Local 2 International Bro. of Telephone Workers* v. *International Bro. of Telephone Workers,* C.D. Mass. 1969, 295 F. Supp. 1178, 1180, aff'd. on a different issue, 1st Cir. 1969, 461 F. 2d 414; *White* v. *King* E.D. La., 1970, 319 F. Supp. 122; *Cefalo* v. *International Union of District 50, United Mine Workers of America,* 1970, 311 F. Supp. 946, 955; *Robins* v. *Schonfeld,* S.D.N.Y. 1971, 326 F. Supp. 525, 531.

[27] *Arcambel* v. *Wiseman,* 311 Dall. 306, 1 L.Ed 613, *Fleischmann* at 717, 718.

ception has been made, "where a plaintiff traced or created a common fund for the benefit of others as well as himself", *id.* 719. Or in a situation similar to the common fund, where by plaintiff's action, "the *stare decisis* effect of the judgment obtained by the plaintiff established as a matter of law, the right of a discernible class of persons to collect upon similar claims", *id.* 719—the monetary common fund concept again. In *Fleischmann,* this Court citing the aforesaid American rule, specifically rejected court authority to award attorney fees in a statutory action, leaving to the plaintiff the remedy Congress provided and no more—a situation comparable and analagous to the issue at bar involving comprehensive and complex statutes with enumerated remedies, as to which the *Fleischmann* court concluded, "marked the boundaries of the power to award monetary relief", *id.* 721.

We respectfully submit that this Court's holding in *Mills, supra,* does not alter the *Fleischmann* holding. In fact it is wholly consistent therewith and most significantly is not authority for attorney fee awards in Section 102 proceedings.

Mills, involved stockholders action against the managers of their corporation relative to a material misleading proxy statement for voting on a corporate merger, predicating jurisdiction on Section 27 of the Securities Exchange Act, 15 U.S.C. Section 78aa, alleging violation of that Act's Section 14(a) and S.E.C. rules. This Court pointed out that:

> "The Act makes no provision for private recovery for a violation of § 14(a) other than the declaration of 'voidness' in § 29(b), leaving the courts with the task, faced by this Court in *Borak,* of deciding whether a private right of action should be implied. The courts must specifically determine whether the special circumstances exist that would justify an award of attorneys' fees, including reasonable expenses of litigation other than statutory costs" *id.* 391.

The *Mills* court following precedent, "implied" a private right of action.[28] It is not a private right which Congress expressly provided. Present in the case at bar however, is a private right created by statute (Section 102), a situation most clearly different and distinguishable from *Mills*. The issue at bar is analagous and comparable to the issue in *Fleischmann*. Furthermore, the implied right in *Mills* is akin to the Act's Section 501(b) provisions, *supra*. Both actions are of a derivative nature, however Congress in Section 501(b) expressly provided the right and the remedy including judicial authority to award counsel fees—such was not done however with respect to Section 102. Of course, significant is that a union is not a private money making business. It's profit is its economic and social gains of its members—its institutional interests are wholly dissimilar from a corporation and have been long so recognized by the nature of Congressional and judicial treatment, *Vaca*, *Morton* and *Linn*, *supra*.

We reiterate, the *Mills* holding should not be utilized to emasculate the long standing American rule enunciated in *Fleischmann*. If such rule is to be changed, it is solely the Congressional function.

E. Conclusion.

This case has presented fundamental issues relative to objective standards to be utilized for the interpretation of Congress' legislative history and its intendment. The lower courts are in conflict as to such legislative history, its meaning and effect. We submit that based on objective criteria employed in the search for an evaluation of the legislative history, as well as Section 102's provisions, courts are not empowered to award counsel fees in actions brought pursuant to such Section. Furthermore, the historic nature

[28] *Yablonski* v. *United Mine Workers*, 314 F. Supp. 616, *supra*, reversed on a different issue fn. 22 *supra*, at 618-620, where the District Court points out that the *Mills* holding constitutes an implied private right as distinguished from Section 102, which is a statutory created private right, as in *Fleischmann*.

of unions and their constituency, facts most familiar to Congress, dispels the drawing of any conclusion that Congress authorized attorney fee awards in actions such as at bar. To the contrary, when Congress authorized such awards against unions they so expressly provided. The decisions of this Court as to the long established American rule applicable to the award of attorney fees as discussed above, should not be changed by the courts—such is solely the legislative function. Nor should this Court's *Mills* decision, implementing created implied private rights, be permitted to become applicable to express statutory created rights, as such would similarly usurp Congress' prerogative to effect the change. Finally, the award of counsel fees in Section 102 actions would have most serious adverse effects upon union self government and upon the ability of a union to act as a meaningful bargaining representative, results contrary to Congressional objectives.

II.

Counsel fees are not awardable in suits against unions under Section 102 for violation of members Section 101 (a) rights where the union acts in good faith or without malice. Nor are such fees awardable unless the suing member is found to have acted in good faith.

Assuming arguendo that Section 102 authorizes District Courts to award counsel fees, there then remains for determination, under what facts and circumstances are such awards proper? As to such latter determination, there is a conflict among the Courts of Appeals.

A. *Legislative And Judicial Concern In Fashioning Monetary Awards Against Unions.*

This Court has demonstrated its and Congress' concern, in a variety of contexts, as to the type and nature

of monetary awards which may be levied against unions. Consistent therewith, this Court has demonstrated that such awards be drawn with great caution.

In *Linn, supra,* this Court, in recognition of the need for stability of labor unions and effective administration of national labor policy, 383 U.S. at 64, postulated the limits of state remedies in common law libel actions against unions. Recovery of damages was limited to, * * * "defamatory statements **circulated with malice and caused (plaintiff) damages", id 65; to "* * * defamatory statements published with knowledge of their falsity or with reckless disregard of whether they were true or false * * *"; id 65; no recovery "except upon proof of (resulting) harm, id 65; with no punitive damages except upon establishing the sufferance of compensable harm, id 66; and "If the amount of damages awarded is excessive, it is the duty of the trial judge to require a remittitur or a new trial", id 65, 66. In result, *Linn* dictates that inter alia, in the interest of national labor policy, monetary awards are not proper against unions absent the finding of their malicious conduct.

In *Vaca supra,* this Court inter alia, was faced with determining under what circumstances monetary damages may be recovered against a union by a member claiming a breach of the union's duty of fair representation, to wit, its failure to process the member's grievance relative to his reemployment after illness, pursuant to collective bargaining agreement provisions in effect between the union and the employer. Reversing the member's monetary damage judgment against the union, it was held that a breach of the aforesaid duty occurs, "* * * only when a union's conduct * * is arbitrary, discriminatory, or in bad faith", 386 U.S. at 190. And the fact that the member may have convinced the trial jury, that he was recovered from his illness and in fact fit to return to work, the same was found insufficient to sustain the damage award, id. 193. The test to establish his claim and secure monetary

damages against the union, as stated by this Court, was, "he must also have proved arbitrary or bad faith conduct on the part of the union in processing his grievance", id. 193. Most recently this Court reiterated the aforesaid test in *Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, etc.* v. *Lockridge,* 403 U.S. 274, that there must be proved, "arbitrary or bad—faith conduct on the part of the union", citing *Vaca,* id. 290. "There must be 'substantial evidence of fraud, deceitful action or dishonest conduct' ", citing *Humphrey* v. *Moore* 375 U.S. 335, id, 290.

The totality of the foregoing we submit, is that in instances where the member's fundamental employment is involved, his economic welfare is at stake such as in *Vaca,* jeopardizing probably accrued pension and other beneficial fund rights,[29] nevertheless the union treasury is not to be levied upon, without the trial court first making the requisite finding of arbitrariness, bad faith, or substantial evidence of fraud, deceitful action or dishonest conduct by the union. Certainly no less standards should be applied for union disciplinary proceedings, particularly in light of Congress' general objectives manifest in the Act, that, "A strong independent labor movement is a vital part of American institutions", and that care must be utilized "* * * neither to undermine self-government within the labor movement nor to weaken unions in their role as the bargaining representatives of employees", *Hodgson* supra, 403 U.S. at 338, *Allis* v. *Chalmers* supra, 388 U.S. at 195.

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[29] It is to be noted that a member disciplined by a union and expelled or suspended from membership, may not lawfully be terminated from or interfered with his employment rights. Such conduct constitutes union unfair labor practices under the Taft-Hartley Act *supra,* Sections 8(b)(1) and (2); also employer unfair labor practices under Section 8(a)(3) of such Act, which may appropriately be remedied under that Act's Section 10(c). It is to be further noted that at bar, as found by the Trial Court, Cole subsequent to his discipline and expulsion retained all employment rights and benefits.

Equally significant why the foregoing *Linn, Vaca, Humphrey* and *Lockridge* tests should be utilized at bar, are the historical facts relative to the functioning of labor unions set forth above [30] and the Act's statutory requirement for unions to adopt a constitution and by laws and their contained self enacted provisions for member disciplinary proceedings.[31] In administering disciplinary proceedings under a union constitution in a reasonable manner,[32] the union tribunal generally consists of its members, workers and lay persons and acts as a quasi judicial body. Manifestly the union should not be liable for damages, let alone counsel fees, for the tribunal's lack of expertise, errors or mistakes, absent proven substantial evidence of fraud, deceitful action or dishonest conduct—arbitrariness, bad faith. Our judicial tribunals with their trained and highly qualified judges, expertise, staff and facilities are not so subject.

Congress through the Act was directing its regulation against unions use of arbitrary powers as witness this Court's observation in *Allis-Chalmers,* 388 U.S. at 195. "The kind of regulation of internal affairs which Senator Taft said protected stockholders of a corporation and made necessary a 'right of protest against arbitrary powers which have been exercised by some of the labor union leaders', is embodied in the 1959 Act." And we submit, it is such conduct alone which was to be redressed.

Further evidence of Congress' concern in fashioning monetary damage awards against unions, in the interest of national labor policy, is manifest in the Taft-Hartley Act. In *Local 20 Teamsters, Chauffeurs and Helpers*

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[30] See also, *Allis-Chalmers, supra,* 388 U.S. at 181. "Integral to this federal labor policy has been the power in the chosen union to protect against erosion its status under that policy through reasonable discipline of members who violate rules and regulations governing membership.[7] Fn. citing authorities.

[31] Section 201(a)(5) (I) *supra.*

[32] *Hardeman supra,* 401 U.S. at 246.

Union, etc. v. *Morton*, 377 U.S. 252, 260, this Court pointed out Congress' intent, that for statutory secondary boycott activities, that Act's Section 303, monetary judgment awards against unions are limited to actual compensatory damages. This Court referred to Senator Taft's statement, that, "Under the Sherman Act the same question of boycott damages is subject to a suit for damages and attorney's fees. In this case, we simply provide for the amount of actual damages" id. 260 fn. 16.

And what about the responsibilities and duties of a member? We submit, as more fully discussed hereafter, a member has the obligation to conduct himself consistent with the reasonable interests of his fellow members and reasonable interests and rules of the union as an institution, so that it may discharge its responsibilities as perceived and reflected in national labor policy. Congress expressly so intended.[33] Surely a fundamental requirement, a most reasonable rule is that a member act in good faith. The Act's Title I provisions were intended as a shield against arbitrary action, *Allis-Chalmers*, 388 U.S. at 195 *supra*. Such Act should not be used by a member as a sword. We submit that no disciplined member, successful in a Section 102 action against his union, should be awarded counsel fees, assuming *arguendo* Section 102 authority, unless it is found that his conduct and the pursuit of his Title I rights and remedies were in good faith.[34]

B. The Standards Applied by Courts of Appeals In Determining When Counsel Fee Awards Are Proper, Are In Conflict.

The question as to whether counsel fees are awardable in a successful Section 102 action, where there is no finding that the member acted in good faith, or where there is no

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[33] Section's 101(a)(2) proviso *supra* "* * * reasonable rules as to the responsibility of every member toward the organization as an institution * * *".

[34] As shown (A. 2), Cole incurred no costs for counsel fees. Cole's counsel was "* * * assigned by the Civil Liberties Union" * * * (and) the services of counsel are rendered gratis * * *".

finding that a union acted in bad faith or with malice, or where there is a finding that the union acted in good faith or without malice, has been before numerous Courts of Appeals and has resulted in apparent different conclusions.

As to the requirement of the successful member's good faith, the Third Circuit in *Gartner* supra, has determined that such member or members may be awarded counsel fees if they "* * * have in good faith pursued their rights under Title I of the Act", 384 F 2d, at 356. Both the Fifth Circuit in *Burch* supra, 454 F 2d, at 1171, and the Ninth Circuit in *Kerr* supra, 466 F 2d, at 1270, concurred with the Third Circuit's conclusion, that counsel fee awards are authorized in Section 102 actions. However, neither the Fifth or Ninth Circuits address any comments as to the condition required by *Gartner*, to wit, the finding of the member's good faith. We may only conjecture.

As to the Second Circuit at bar, although they rely upon the Third Circuit's *Gartner* holding, that counsel fee awards may be proper in Section 102 actions, they are not however, in complete accord with *Gartner*. For as noted, *Gartner* requires the condition that the member must have acted in good faith, whereas at bar before the Second Circuit, the Trial Court did not find Cole's good faith, but on the contrary, concluded that Cole was, "in part, motivated by * * * political ambitions for union office", (A. 2-C. 38, ¶ 34). Nevertheless, the District Court awarded counsel fees to Cole and the Second Circuit affirmed.

We respectfully submit that Congress manifested that Title I was intended to remedy abusive powers[35] and not to have union treasuries subject to monetary awards including counsel fees, for members who have not established their good faith. Surely, fellow members' treasury assets should not be used to pay Cole's counsel fees to subsidize his ambitions for political office.

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[35] *Allis-Chalmers* 388 U.S., at 195 *supra*.

As to the issue of a union's bad faith or malice requirements, the aforesaid *Vaca, Linn, Humphrey* and *Lockridge* holdings, none of the Circuits above, other than the Fifth in *Burch* supra, have required such finding against the union as a condition for the award of counsel fees. In *Burch* the Fifth Circuit, per curiam, affirmed the District Court's award on a finding that the union's action was "arbitrary and discriminatory", 454 F2d at 1171.

At bar, notwithstanding the District Court's findings that all defendants acted in good faith, believed they had a right to charge and discipline Cole and that there was an absence of showing of malice by any of the defendants (A. 3-C. 19a; A. 2-C. 38a), nevertheless, counsel fees were awarded and the Second Circuit affirmed.

We reiterate, assuming arguendo Section 102 authority, counsel fee awards are only proper upon a finding of the union member's good faith as set forth above, together with a finding of the union's bad faith or malice and that all of such findings must be based upon substantial evidence in the record. The above described legislative history, trade union status structure history and this Court's decisions, supra, mandate such standards.

Conclusion

The American rule is that attorney fees are ordinarily not recoverable in the absence of a statutory or contractual provision allowing thereof. Congress' enacted Section 102 does not contain any authority for the award of attorney fees. The Act's legislative history, taken together with the history of trade union structure status known to Congress, together with this Court's decisions elucidating Congress' general objectives of the Act, and its concern for monetary awards against unions contrary to national labor policy, all direct that Congress did not authorize the award of counsel fees in successful Section 102 actions. Such Sec-

tion constitutes Congress' statutory conclusion, and Judge made exceptions to award counsel fees in such actions is not authorized, as such conduct contravenes the aforesaid American rule. The change of said rule is solely a Congressional function.

Assuming arguendo, counsel fee awards are authorized by Section 102, the same are not proper unless there are findings, based upon substantial evidence in the record, that the suing member pursued his Title I rights and remedies in good faith and that the union acted arbitrary, with malice, in bad faith.

The District Court's judgment below and its affirmance by the Court of Appeals, awarding counsel fees, should be reversed and remanded with direction to vacate the counsel fee award.

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Supreme Court of the United States

October Term, 1972

No. 72-630

PAUL HALL, etc., et al.,

Petitioners,

v.

JOHN COLE

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

This brief *amicus*, in support of the position of the petitioners, is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), a federation of 115 national and international labor unions, having a total membership of approximately 13,500,000 working men and women, with the consent of the parties, as provided for in Rule 42 of the Rules of this Court.

ARGUMENT

1. "The general American rule is that attorneys' fees are not ordinarily recoverable as costs [, however,] both the courts and Congress have developed exceptions to this rule for situations in which overriding considerations indi-

cate the need for such a recovery." *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 391-392. Where a statute is silent on the question of remedies,[1] and where the claim sued upon is not based on a statute, the courts have been required to fall back upon their own conceptions of sound policy in determining when exceptions to the general rule shall be declared. The void created by the lack of authoritative guidance from the legislature, "leave[s] the courts with the task • • • of determin[ing] whether the special circumstances exist that would justify an award of attorneys' fees • • •." *Id.* at 391. But, since Congress' power over remedies is plenary (cf. *South Carolina* v. *Katzenbach*, 383 U.S. 301, 325-327), where a statute is addressed to both rights and remedies, the judicial role is more circumscribed: it is to ascertain the intent of Congress by "reconstitut[ing] the gamut of values current at the time when the [statutory] words were uttered." *Woodwork Mfrs. Assoc.* v. *NLRB*, 386 U.S. 612, 620 (quoting L. Hand, J.).

In the present context, that task is simplified because, in response to this Court's long-standing rule "that attorneys' fees are not ordinarily recoverable in the absence of a statute • • • providing therefor," Congress has "selectively provid[ed for this] remedy in connection with various • • • statutory causes of action • • • by expressly allowing recovery of attorneys' fees." *Fleischmann Corp.* v. *Maier Brewing Co.*, 386 U.S. 714, 717, 720-721, & n. 17. This

[1] Both § 14a of the Securities Exchange Act of 1934, the provision at issue in *Mills*, and § 16(b) of that Act, also discussed therein (396 U.S. at 390-391), establish rights without specifying in any way the relief to be awarded in a suit by a private party.

Court has, therefore, concluded that where Congress has specifically addressed itself to remedial considerations, in a manner which demonstrates that the remedies specified "mark the boundaries of the power to award monetary relief in cases arising under [that] Act," and has not expressly provided for attorneys' fees, a "judicially created compensatory remedy in addition to the express statutory remedies is inappropriate * * *." *Id.* at 721.[2] This approach, which has been followed without exception, so far as we are aware, provides Congress with a substantial measure of certainty as to the course of judicial interpretation, thereby assuring that in the area where Congress' powers are primary, the determination that an exception should be made to the "general American rule * * * that attorneys' fees are not ordinarily recoverable" (*Mills*, 396 U.S. at 391), will truly be the legislature's and not the court's.

2. Section 102 of the Labor Management Reporting and Disclosure Act of 1959, which states that in a Title I suit the courts are empowered to provide "such relief (including

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[2] Indeed, such is the force of this presumption against implying the power to award attorneys' fees in a statutory context, that it was applied to trademark suits under the Lanham Act in *Fleischmann*, even though a pre-Lanham Act decision (*Aladdin Mfg. Co.* v. *Mantle Lamp Co.*, 116 F.2d 708 (C.A. 7)) had held that counsel fees were recoverable in a trademark action and the Lanham Act empowered the courts to grant relief "subject to the principles of equity;" circumstances which, but for that presumption, would have supported the opposite construction of that Act, on the ground that Congress "was aware of the Aladdin decision and intended to preserve the rule of that case." Cf. 386 U.S. at 722 (Mr. Justice Stewart dissenting).

injunctions) as may be appropriate," *does* "expressly provide the remedies for vindication of the cause[s created by Title I of the Act]" (*Fleischmann*, 386 U.S. at 720); and it *does not* expressly provide for attorneys' fees. Thus, under *Fleischmann*, § 102 must be construed as not authorizing attorneys' fees in Title I suits, unless the legislative materials make it perfectly plain that Congress understood the phrase "such relief" to authorize the granting of that extraordinary remedy. But those materials do not contain a single indication that the failure to specify attorneys' fees in § 102 was an oversight; on the contrary, they demonstrate beyond peradventure that Congress understood that in exercising jurisdiction under § 102 the courts would not have the power to grant such fees.

(a) The court below viewed the phrase "such relief as may be appropriate" as "unlimited language." Pet. App. 9a. But the pattern of the Act reveals that, at most, Congress was of the view that that language, standing alone, simply authorized substantive relief for the violation committed, in the form of damages, injunctions and accountings, as distinguished from incidental relief for the normal expenses of litigation, such as costs and attorneys' fees.

In the LMRDA, Congress used the phrases "appropriate relief" and "such relief (including injunctions) as may be appropriate" five times. See §§ 102, 210, 304(a) (twice), 501(b). In § 210, the phrase "such relief (including injunctions) as may be appropriate" identifies the type of relief which the Secretary of Labor alone may seek, relief which plainly would not encompass counsel fees incurred

by the Secretary. Its first use in § 304(a) also refers to suits by the Secretary; and it is unlikely in the extreme, that Congress would twice use the same language in a single subsection of a statute, with an intent to permit the granting of the extraordinary remedy of attorneys' fees in one instance but not in the other. Moreover in a third instance, § 501(b), union members "may recover damages" or "secure an accounting" or "other appropriate relief," *plus* "the fees of counsel" and "any expenses" of the litigation.

The position of the court below must, therefore, be based on the proposition that the phrase "such relief" in § 102 has a different meaning than it does in every other instance in which it is used in the LMRDA. There is nothing in the evolution of that section to support that view. The predecessor to § 102 (§ 103 of Senator McClellan's floor amendment to S. 1555, 86th Cong. 1st Sess. (Dept. of Labor Leg. Hist. of the LMRDA pp. 248-249)) also used the phrase, "such relief as may be appropriate including, but without limitation, injunctions to restrain any such violations and to compel compliance with this title," to identify the type of relief which the Secretary of Labor alone might seek, relief which, as just noted, plainly would not encompass attorneys' fees. Again, it is unlikely in the extreme, given its derivation, that Congress would have retained the phrase "such relief" in § 102 of the LMRDA, if its intent had been to authorize the courts to grant attorneys' fees. Indeed, the phrase "including injunctions" was added to § 102 in Conference, in evident recognition of the fact that the logical reading of the phrase "such relief as may be appropriate," standing alone, when the remaining sections of the Act

providing civil remedies, and the predecessor to § 102, contained explicit references to injunctions, was that it only authorized damages. And, of course, the authority to grant attorneys' fees is not part of the law of damages; "[t]he foundation for the historic practice of granting reimbursement for the cost of litigation other than the conventional taxable costs is part of the original authority of the chancellor to do equity in a particular situation." *Sprague* v. *Ticonic Nat. Bank*, 307 U.S. 161, 166. Nor can the limited grant of the authority to issue "injunctions," the staple of equity jurisprudence, be transformed into a grant of jurisdiction to award non-injunctive relief of a character authorized by equity in the special circumstances presented by such cases as *Sprague*.

Thus, if the phrase "such relief" is to be given a consistent meaning throughout the LMRDA, it can not be construed as including the authority to grant attorneys' fees. And, of course, the normal presumption, overcome only by compelling legislative history to the contrary, is that Congress is consistent in its word-usage when drafting statutes.

(b) Section 501(b), pursuant to which a union member, who secures leave of court, may bring a derivative action on behalf of his union, against an officer or agent of the labor organization who has violated his fiduciary obligations, where such organization has refused or failed to sue those officers, is triply instructive in regard to Congress' intent. First, as just noted, its language alone, which empowers the courts to provide "damages," an "accounting," and "appropriate relief," in addition to the "fees of counsel," tends to rebut the suggestion that Congress utilized

the phrase "such relief as may be appropriate" as a catch-all which includes the authority to assess attorneys' fees.

Second, it demonstrates that the sponsors of the LMRDA were aware of, and guided by, the general principle that attorneys' fees are recoverable in a statutory action only where expressly authorized. See pp. 1-3 *supra*. "A primary judge-created exception to * * * the general American rule * * * that attorneys' fees are not ordinarily recoverable * * * has been to award expenses where a plaintiff has successfully maintained a suit, usually on behalf of a class, that benefits a group of others in the same manner as himself." *Mills*, 396 U.S. at 392. And the derivative suit for the breach of fiduciary duties created by § 501(b), was expressly based on shareholder's derivative suits such as that in *Mills* itself. Dept. of Labor Leg. Hist. of the LMRDA p. 1028 (Sen. Javits). Thus, if Congress had been of the view that the phrase "appropriate relief" was sufficient to incorporate the "judge-created exception[s]" to the "general American rule" into a statute, it would have manifested that understanding in § 501(b), for the suits authorized therein fall within the class in which the practice of awarding attorneys' fees was most firmly established. But even in § 501(b), Congress did not leave the matter to inference; true to its consistent pattern (see *Fleischmann*, 386 U.S. at 721 n. 17), it provided for attorneys' fees expressly.

Third, the theme which runs through the congressional enactments regulating union conduct is an extreme reluctance to authorize remedies which might provide the occasion for harassing litigation. This attitude of restraint is a legislative response to the "free-wheeling judicial exer-

cises" which had characterized the era of "government by injunction." *Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 382-383. Thus, the central purpose of the Norris-La Guardia Act is to limit the equity powers of the courts. And in the National Labor Relations Act, as amended by the Labor Management Relations Act, Congress was at pains to assure that the Board would not have the authority to impose "punitive" remedies. See, e.g., *Local 60, Carpenters* v. *NLRB*, 365 U.S. 651; *Republic Steel Co.* v. *NLRB*, 311 U.S. 7. Moreover while Congress, in § 303 of the LMRA, authorized private suits in which actual damages for certain unfair labor practices may be recovered, it deliberately precluded the award of attorneys' fees or punitive damages. See *Teamsters Union* v. *Morton*, 377 U.S. 252, 260-261, with special reference to n. 16 quoting Sen. Taft. And, precisely because it was recognized that Title I lawsuits can be used as weapons to "break up a union" (Dept. of Labor Leg. Hist. of the LMRDA p. 296 (Sen. Clark), the protection of the right to sue accorded in § 101(a)(4) is limited by the proviso, "That no interested employer or employer association shall directly or indirectly finance, encourage, or participate in, except as a party, any such action, proceeding, appearance, or petition." See generally Dept. of Labor Leg. Hist. of the LMRDA, pp. 295-298. Section 501(b) is in conformity with this overall pattern. While permitting attorneys' fees, it contains a critical safeguard against "strike" suits by providing, "No such proceeding shall be brought except upon leave of the court obtained upon verified application and for good cause shown." But there is no such limitation in § 102. For that section, as Congress wrote it, simply pro-

vides substantive relief for the violation committed, in the form of damages and an injunction, as distinguished from incidental relief for the normal expenses of litigation, in the form of attorneys' fees.

In sum, when the LMRDA is viewed in its entirety, and against the background provided by prior labor legislation, a careful and explicit set of "intricate remedies" (*Fleischmann*, 386 U.S. at 719) becomes evident. Section 102 is but one of the remedial provisions afforded union members; see also §§ 201(c), 304(a) and 501(b). These are supplemental by both criminal sanctions, and civil remedies afforded the Secretary of Labor. See, §§ 209, 210, 303(b), 304(a), 304(c), 402(b), 502, 503, 602 and 610. But in only two instances—not including § 102—has Congress specifically authorized the recovery of attorneys' fees. See §§ 201(c) and 501(b).[3] Thus here, as in *Fleischmann*, the statutory scheme compels the conclusion that a "judicially

[3] Section 501(b) has already been discussed; pp. 5, 6-8 *supra*. Under § 201(c), a union member may sue to enforce the labor organization's duty to make available certain specified information and records; and the court may, "in its discretion, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action." There is no explanation of the inclusion of an award of attorneys' fees in § 201(c). But it would appear that it was provided since there would be no incentive for an individual union member to bring a § 201(c) suit in its absence, in light of the fact that a violation does not infringe individual, as opposed to group, rights. In contrast, Title I suits grow out of alleged violations which affect the complaining party as an individual, through the loss of membership rights, a fine, the imposition of higher dues, etc.; personal interests which provide ample incentive to bring suit.

created compensatory remedy in addition to the express statutory remedies is inappropriate" (386 U.S. at 721).

(c) The background to the enactment of § 102 further solidifies the conclusion, apparent from the language and structure of the LMRDA, that Congress did not intend to authorize the award of attorneys' fees in Title I litigation:

> "[Title I] began life as a floor amendment to S. 1555, the Kennedy-Ervin Bill, in the 86th Congress. [That title as] proposed by Senator McClellan, and as adopted by the Senate on April 22, 1959 * * * did not long survive. Two days later, a substitute amendment was offered by Senator Kuchel, who explained that further study of the McClellan amendment had raised 'some rather vexing questions.' * * * The Kuchel substitute, [was] adopted the following day * * *" *Boilermakers* v. *Hardeman*, 401 U.S. 233, 243.

As already noted (p. 5 *supra*), the McClellan amendment provided for enforcement through the Secretary of Labor. The Kuchel substitute, which included § 102 in its present form (except that it omitted the phrase "including injunctions"), modified the McClellan amendment by providing that Title I would be enforceable by private suits.

The argument for this modification stressed by its sponsors, as developed by Senator Kennedy in his statement of objections to the McClellan amendment, which provided the foundation for the Kuchel substitute, was that they were "reluctant to have the Secretary of Labor and the Attorney General become involved in all matters which may be considered when we talk about equal protection of rules and regulations and equal rights and privileges"; and

that, as Senator Clark noted, they, therefore, desired to "take the Federal bureaucracy out of this bill of rights and leave its enforcement to union members, aided by the courts." Dept. of Labor Leg. Hist. of the LMRDA, pp. 264, 290; see also p. 271 (Sen. Kennedy), p. 283 (Sen. Johnson of Texas), pp. 284 and 288 (Sen. Kuchel). Neither this argument, nor the subsidiary points advanced to buttress it, lend any support to the contention that those Senators intended § 102 to include the authority to award attorneys' fees. And, the debate on the extent to which employer financing of Title I suits should be prohibited (noted at p. 8 *supra*), which occurred immediately after § 102 had been discussed, with its references to the fact that "an employee could go to a bank to borrow money for his defense" (Dept. of Labor Leg. Hist. of the LMRDA p. 297 (Sen. Clark)), and which resulted in the decision to add the word "interested" before "employer," in order to protect the right of the member "to borrow from a friend to start a suit" (ibid), strongly suggests a common assumption that the member, and not the union, would finance Title I lawsuits.

Indeed, the assertion that Title I was intended to authorize attorneys' fees is directly contrary to the essential thrust of the Kuchel substitute. In 1959 there was no significant opposition to labor union "reform." The opposing philosophies which sought expression in the LMRDA were, on the one hand, that the trade union movement was so deeply flawed by corrupt and undemocratic practices that far-reaching legislative remedies were necessary, even if that legislation imperiled basic and entirely legitimate

union institutional interests; and on the other, that:

> "A strong independent labor movement is a vital part of American institutions. The shocking abuses revealed by recent investigations have been confined to a few unions. The overwhelming majority are honestly and democratically run. In providing remedies for existing evils the Senate should be careful neither to undermine self-government within the labor movement nor to weaken unions in their role as the bargaining representatives of employees." Dept. of Labor Leg. Hist. of the LMRDA, p. 118 (S. Rep. No. 187, 86th Cong. 1st Sess.).

As this Court has recognized, it was the latter philosophy which prevailed. See, e.g., *Calhoon* v. *Harvey*, 379 U.S. 134, 140; *Musicians* v. *Wittstein*, 379 U.S. 171, 178-179; *Wirtz* v. *Glass Bottle Blowers*, 389 U.S. 463, 470-471. Its leading exponents were Senators Kennedy, Kuchel and Clark. The softening changes they secured to the McClellan amendment, including the provision for private suits, rather than suits by the Secretary of Labor, to enforce Title I, were intended to "eliminate some of the more stringent requirements of Senator McClellan's Bill of Rights" (*Wittstein*, 379 U.S. at 179), in order to produce "a compromise bill of rights acceptable to labor" (Dept. of Labor Leg. Hist. of the LMRDA p. 315 (Sen. McClellan)). It turns matters on their head to suggest that in modifying § 102, they sought to accomplish a change by which the unions themselves, rather than taxpayers generally, would finance the prosecution of Title I litigation.

In the House, Representatives Landrum and Griffin incorporated § 102, as it had passed the Senate, in their

substitute for the bill reported out by the House Committee on Labor and Education. And the House adopted this portion of the Landrum-Griffin bill as proposed. See Dept. of Labor Leg. Hist. of the LMRDA pp. 325-326, 361-362.

Neither Representative Landrum or Griffin discussed § 102 directly in explaining their substitute. But in defending the interrelated decisions to delete § 607 of the Senate bill (which had provided criminal sanctions for unlawful discipline of members engaging in activities protected by the LMRDA), and to limit criminal penalties to acts of physical violence directed at those exercising the rights guaranteed by the Act (see § 610 of the LMRDA; Dept. of Labor Leg. Hist. of the LMRDA p. 1117), Representative Griffin did explain his approach to the enforcement of Title I:

> "The substitute bill provides that denial of rights guaranteed by the act through union discipline shall be unlawful; however, unlike S. 1555, the substitute provides for civil, rather than criminal, enforcement. In our judgment, the conduct prohibited by this section is generally comparable to conduct described as an unfair labor practice under the Taft-Hartley Act and, accordingly, we do not believe that criminal sanctions are warranted." Dept. of Labor Leg. Hist. of the LMRDA p. 1117.

Since it was perfectly well settled at the time that the relief provided by the NLRA was limited to compensation for the actual loss caused by a violation (see *Local 60 Carpenters*, 365 U.S. 651; *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177), and it had never even been suggested that the litigation expenses of a charging party before the

NLRB were compensable, the equation drawn between Title I and the NLRA, supports the view that the sponsors of § 102 did not intend to authorize the award of attorneys' fees.[4]

Aside from the foregoing, the only statements at all in point by House members who might be considered supporters of § 102 of the LMRDA, were by Representatives Elliot and O'Hara, who noted, while explaining § 102(b) of the House Committee bill, which provided authority to "restrain [§ 101] violations and to grant such other and further relief as may be appropriate," that that section "would give 'a wide latitude to grant relief according to the necessities of the case,' [Rep. Elliot] * * * to cover 'any loss suffered by a member.' [Rep. O'Hara]" (Pet. App. 9a). The court below found these "sufficient for us to include the awarding of counsel fees here." *Ibid.* But these highly general statements point rather to the conclusion that § 102 provides complete relief under the normal law of damages, and of

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[4] In 1972 the Board, for the first time in its history, awarded attorneys' fees to a charging party, on the ground that in that case the respondent-employer's defenses were "frivolous." *Tiidee Products Inc.*, 194 NLRB No. 198, 79 LRRM 1175; compare *Heck's Inc.*, 191 NLRB No. 146, 77 LRRM 1513 (denying such relief). The *Tiidee* decision, like *Gartner* v. *Soloner*, 384 F.2d 348 (C.A. 3) cert. denied 390 U.S. 1040, the prior authority relied on below, rests on the view that the courts and administrative agencies, in enforcing specific statutory mandates containing no express provision for attorneys' fees, are free to follow the general equity principles stated in *Sprague*, 307 U.S. at 166. And, since the range of the Board's ruling is far more limited than that of the court below, the former's validity would appear to follow *a fortiori*, should this Court affirm in the instant case.

injunctions, for the direct consequences of a violation, but does not provide authority for the granting of incidental relief associated with the costs of litigation through the extraordinary remedy of attorneys' fees. Certainly, they are not definite enough to be a "sufficient" base for the opposite conclusion.

The short of the matter is that there is not a single direct assertion by the sponsors of § 102, that that section did provide for attorneys' fees. "The silence of the sponsors is pregnant with meaning." *NLRB* v. *Fruit Packers*, 377 U.S. 58, 66.

This silence can not be attributed to a failure by those who opposed § 102, on the ground that it was not sufficiently comprehensive, to press their case. Senator Goldwater, who led the opposition, took the unusual step of appearing before the House Committee on Education and Labor to develop the arguments for House action which would make the inhibitions on union action contained in the Senate bill more stringent. In some particulars he was successful. For example, his testimony provided the genesis for the House amendment to § 101(a)(4), which shortened the period of exhaustion of internal remedies prior to filing suit from 6 to 4 months, in order to preserve access to the NLRB. See Dept. of Labor Leg. Hist. of the LMRDA pp. 307-308; compare *NLRB* v. *Marine & Shipbuilding Workers*, 391 U.S. 418, 425-428. In others, the House followed the Senate in rejecting the position Senator Goldwater espoused. For example, the Senator was highly critical of the Senate bill's failure to require that discipline "be based on activity that the union had proscribed prior to the union member being

engaged in such activity." Dept. of Labor Leg. Hist. of the LMRDA p. 308. But the House, nevertheless adopted § 101(a)(5), as it passed the Senate. Even in those instances, as the Court squarely recognized in *Hardeman*, 401 U.S. at 244, Senator Goldwater's description of the scope of the Senate bill was regarded by all concerned as accurate and authoritative.

With regard to § 102, Senator Goldwater argued:

> "[That section] does not grant [a Title I plaintiff], even where successful in his suit, reasonable counsel fees or other costs. It thus forces him to assume the entire financial burden of the litigation. For an ordinary rank-and-file union member who is generally a wage worker, such a litigation thus becomes an impossible financial burden. In recognition of these difficulties, the Fair Labor Standards Act, for example, requiring the payment of minimum wages and premium overtime pay for certain categories of workers, permits not only the worker himself to bring a suit for nonpayment (which he may do in the State as well as the Federal courts) and to recover attorneys' fees and court costs if successful, but if the worker prefers, he may have the Secretary of Labor bring such suit in his behalf." Dept of Labor Leg. Hist. of the LMRDA pp. 308-309.

Thus, the Senator provided both a policy justification for amending § 102, and an explicit reminder, through his reference to the FLSA, that in the past, Congress had authorized attorneys' fees expressly when it wished to empower the courts to make such an award.

The argument for amending § 102 proved convincing to

a minority of the House Committee, whose dissenting views to the House Report stated:

> "One of the most serious inadequacies of the Senate Bill is the lack of any effective enforcement procedure to protect union members from those few union officials who fail to recognize that a union belongs to its members. Under that bill the individual member must shoulder the burden of litigation costs himself." Dept. of Labor Leg. Hist. of the LMRDA pp. 323-324.

The proposal to provide for attorneys' fees in Title I suits did not, however, command a majority. The House chose instead to adopt § 102 of the Senate bill.

The opinion in *Gartner* v. *Soloner*, 384 F.2d at 351-353, relied on by the court below (Pet. App. 8a-9a), dismissed Senator Goldwater's testimony as an "offhand thought" of less dignity than "floor debate," based on an inadequate analysis of the potentials for judicial innovation inherent in the phrase "such relief (including injunctions) as may be appropriate," and inconsistent with the statements of the sponsors. Cf. *Woodwork Mfrs. Assoc.*, 386 U.S. at 639-640. But this characterization of the probative value of the Senator's testimony is directly at odds with this Court's evaluation in *Hardeman*, 401 U.S. at 244. Moreover, the *Gartner* court's expansive reading of "such relief" is inconsistent with both the language and structure of the LMRDA, and with this Court's teaching that where a statute contains remedial provisions, but does not expressly authorize attorneys' fees, the presumption is that Congress did not intend to allow such fees to be awarded. See pp. 1-3 *supra*. And, as already shown, the statements of the

sponsors do not demonstrate an intent to provide for attorneys' fees.

To be sure, "when interpreting a statute," statements of the opposition which tend to "overstate [its] reach" are not to be relied upon. *Woodwork Mfrs. Assoc.*, 386 U.S. at 639-640. But Senator Goldwater was not "expressing fears" *(ibid)*, belied by the statute itself, or by the expressed intent of the sponsors. He was stating what certain language meant, with the end in view of securing an amendment which would change that meaning, and not to defeat the bill as a whole. In light of the failure of Congress to accept his proposal, the controlling authority is not the above-noted passages from *Woodwork Mfrs. Assoc.;* it is the point made by Mr. Justice Frankfurter in *Carpenter's Union* v. *NLRB*, 357 U.S. 93, 99-100:

> "It is relevant to recall that the [LMRDA] was, to a marked degree, the result of conflict and compromise between strong contending forces and deeply held views on the role of organized labor in the free economic life of the Nation * * * This is relevant in that it counsels wariness in finding by construction a broad [remedial] policy [providing for attorneys' fees] when, from the words of the statute itself, it is clear that those interested in just such a [policy] were unable to secure its embodiment in enacted law."

(d) In an effort to overcome the force of the points just made the court below surmised that "cases vindicating [Title I] rights would never be filed * * * without the discretionary authority in courts to grant counsel fees"; and posited a gross imbalance of resources between the individual and his union, "It is difficult for individual members

of labor unions to stand up and fight those who are in charge. The latter have the treasury of the union at their command and the paid union counsel at their beck and call while the member is on his own." Pet. App. 7a-8a.

The facts are to the contrary. *Gartner* v. *Soloner*, decided on September 1, 1967, 8 years after the effective date of the LMRDA, was the first case to hold that Title I plaintiffs could secure attorneys' fees. All prior authority had been to the contrary. Yet, according to the Office of the Solicitor of the Department of Labor:

> "Since September 14, 1969, the effective date of the Act [and prior to October 25, 1967], there have been approximately 850 private actions filed under the first six titles of the L.M.R.D.A. While this office does not maintain a listing of these cases according to the particular titles involved, we estimate that 650 were filed under Title I, 30 under section 201(c) and 50 under section 501(b)." Petition for a Writ of Certiorari in *Soloner* v. *Gartner*, No. 1051, Oct. Term, 1967, pp. 17-18.

Thus, there is no substance to the proposition that "without counsel fees the grant of federal jurisdiction [in § 102] is but a gesture, for few union members could avail themselves of it." Pet. App. 8a.

We do not gainsay the proposition that Title I litigation imposes a financial burden on plaintiffs. Indeed, the debate on § 101(a)(4) noted above (p. 11), shows that Congress recognized that fact. For all of us "the expense and annoyance of litigation is 'part of the social burden of living under government.' " *Petroleum Exploration* v. *Public Service Commission*, 304 U.S. 209, 222. With few exceptions, Congress has, nevertheless, determined that plaintiffs should

bear their own litigation expenses, even where that course may work a substantial financial hardship. See e.g. *United States* v. *Kras*, ... U.S. ....., 41 U.S.L.W. 4117.

As *Kras* demonstrates, within the broadest constitutional limits, such judgments are for Congress to make. For, in many instances, of which this is one, there is no ideal solution. In the overwhelming majority of the situations covered by Title I, local unions are the labor organizations that discipline members and must answer for their actions in court. There can be no doubt that Title I was not intended to make it impossible for them to continue to carry out this disciplinary function. On the contrary, Congress was at pains to insure that § 101(a)(1)'s guarantee of equal rights would be "subject to reasonable rules and regulations in such organization's constitution and bylaws," that "nothing" in §101(a)(2)'s guarantee of freedom of speech and assembly should "be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations," and that the safeguards against improper disciplinary action should be limited to the basic elements of procedural due process (see *Hardeman*, 401 U.S. 233). But, approximately 75% of the some 48,000 local unions in this country have had annual receipts of $25,000 or less per year during the period 1960 to 1970. Dept. of Labor, Labor Management Services Admin., Union Financial Statistics 1960-1970 (Oct. 1972) Table 7, p. 26. They are not organizations with "paid union counsel at their

beck and call" (Pet. App. 8a), who can afford to defend their actions in the litigation process, which "is at best uncertain," without regard to the fact that they would be "penalized for merely defending • • • a lawsuit" *(Fleischmann,* 386 U.S. at 718). Indeed they are precisely the type of defendants who would be "unjustly discouraged from [defending] actions to vindicate their rights if the penalty for losing included the fees of their opponents counsel" *(ibid).*

Given Congress' desire to protect individual member's rights without sacrificing valid union institutional interests, the relative balance of resources available to the parties, and the price to be paid in scarce judicial resources of a contrary decision (*Fleischmann,* 386 U.S. at 718), it is not surprising that Congress chose to leave litigation costs where they lay.[5]

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[5] To this juncture we have sought to demonstrate that in the instant case, as in *Fleischmann,* a "judicially created compensatory remedy in addition to the express statutory remedies is inappropriate • • •." (386 U.S. at 721). We now show briefly, in conclusion, that the decision below is wrong, even if it be assumed *arguendo* that the absence of an express authorization for the award of attorneys' fees in § 102 is not fatal to such a claim in all Title I cases.

The "judge-created exception" to "the general American rule," relied on explicitly by the District Court (Pet. App. 20a-21a), and implicitely by the Court of Appeals (7a-8a), is that most recently restated in *Mills,* 396 U.S. at 392:

> "Where a plaintiff has successfully maintained a suit, • • • that benefits a group of others in the same manner as himself • • • [to] allow the others to obtain full benefit from the plaintiff's efforts without contributing equally to the litigation expenses would be to enrich the others unjustly at the plaintiff's expense."

CONCLUSION

For the above stated reasons, as well as those set out in

In other words, where a plaintiff brings a suit which results in a decree which improves the legal position of others "in the same manner" as it improves the plaintiff's, the equitable doctrine of unjust enrichment requires that the costs of securing this benefit be shared by all those who enjoy it in "full." And, as a corollary of the first proposition, where the lawsuit results in a decision whose *stare decisis* effect is the equivalent of such a decree, the same result obtains. *Mills*, 396 U.S. at 392-393, citing *Sprague*, 307 U.S. 161.

In the instant case, the plaintiff secured a

> "Judgment for a mandatory permanent injunction directing that he be reinstated to membership and restored to all financial benefits accruing to members and * * * for reasonable counsel fees." Pet. App. 39a

Plainly, the only person who derived a direct benefit from that judgment was the plaintiff himself. In contrast to cases like *Mills*, where the decree resulted in reopening a transaction which had a common adverse effect on all the members of the group being assessed for attorneys' fees (the corporation's shareholders), "in the same manner as [the plaintiff] himself;" this decree runs only in favor of the plaintiff as an individual. It is therefore contrary to, rather than consistent with, equity to assess attorneys' fees here, on the basis of the effect of the decree.

To be sure, it might be argued that the decision benefits the group through its *stare decisis* effect, in that it reaffirms the proposition stated in the leading cases of *Salzhandler* v. *Caputo*, 316 F.2d 445 (C.A. 2) and *Farowitz* v. *Musicians* 330 F.2d 999 (C.A. 2) (both decided after the union acted in this case), that a member is "not subject to expulsion even though his [speech] was held by the [Union's] Trial Committee to be 'malicious vilification' or for that matter false or libelous" (Pet. App. 4a-5a). But in contrast to *Sprague*, where the *stare decisis* effect was to perfect a right of the narrowly delimited group being assessed (the right to "recover out of specific assets of the same defendant" (*Mills*, 396 U.S. at 393));

the plaintiff's brief, the award of attorneys' fees ordered

in the instant case, the reiteration of the general principle announced, rebounds to the overall advantage of all union members, and not especially to the members of the Seafarers Union. It is the latter alone, however, who are being directed to pay. This Court's opinions do not suggest that *Sprague* has so far a reach. And for good reason. The granting of a statutory right, with the rarest of exceptions, is intended to benefit a class, not a single individual. Thus, whenever a plaintiff, who invokes such a right, prevails on the basis of a reasoned opinion, his victory provides a *stare decisis* benefit to that class. But, if that were deemed to be enough, the *Sprague* rule would cease to be a "limited exception" (*Fleischmann*, 386 U.S. at 718), to "the general American rule • • • that attorneys' fees are not ordinarily recoverable" (*Mills*, 396 U.S. 391), and would become, instead, the vehicle for replacing the American rule with the English rule. Since this Court has specifically disclaimed any such intent, *Sprague* must mean that attorneys' fees are recoverable only when the *stare decisis* effect of a decision serves to advance the common interest of the specific group being assessed in achieving a discrete objective distinct from the general interest of an overall class in having certain questions of law decided in their favor. And so read, *Sprague* does not support an award of attorneys' fees here.

The sum of the matter is that the courts below entirely misunderstood the scope of the "limited exception" created by the *Sprague-Mills* line of authority, and that as a result, the attorneys' fee they authorized is in direct contravention of this Court's long-standing adherence to the proposition "that attorneys' fees are not ordinarily recoverable" (*Fleischmann*, 386 U.S. at 717-719).

below should be reversed.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-630

PAUL HALL, individually and as President, or AL KERR, as Secretary-Treasurer, or EARL SHEPARD, as Vice President, or CAL TANNER, as Executive Vice President of the SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA–ATLANTIC, GULF, LAKES AND INLAND WATERS DISTRICT,

Petitioner,

v.

JOHN COLE,

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-630

PAUL HALL, individually and as President, or AL KERR, as Secretary-Treasurer, or EARL SHEPARD, as Vice President, or CAL TANNER, as Executive Vice President of the SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA - ATLANTIC, GULF, LAKES AND INLAND WATERS DISTRICT,

Petitioner,

v.

JOHN COLE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF

STATEMENT OF FACTS

At a membership meeting of the Petitioner labor union[1] at its headquarters in Brooklyn, New York, on August 6, 1962, the Respondent here, John Cole, a

[1] The union—or, more accurately, the Atlantic, Gulf, Lakes and Inland Waters District of the Seafarers International Union of North America—is the only remaining defendant below and hence the only petitioner here. The case has been dismissed against the individual defendant and against the individuals named, in the caption, in their representative capacities.

member of the union, introduced for the consideration of his fellow members a proposed resolution calling for reform of the union's shipping rules (C 12a, 28a). His resolution sought to regularize the union's rotary hiring process so that men would be shipped in proper order; it also sought to end the ruinous, self-defeating policy of "raiding" sister unions, a policy that had engaged the union, to the detriment of its members, in "dog-eat-dog warfare" with sister unions (C 30a-32a). Those objectives were Cole's own reasons for introducing the resolution (Appendix in the Court of Appeals, 115a, 131a, 164a).

Cole's resolution was in proper order. In fact, Paul Hall, who was and is President both of the union and of its parent International, specifically declared that it was in order; in deference to that declaration, the Chairman of the meeting, Paul Hall's brother William, formally ruled it in order (C 28a). At the latter's direction, however, Cole was not allowed to read it to the members and it was read instead by the union's reading clerk (C 12a, 28a). Paul Hall then spoke against the resolution and against Cole personally, calling Cole an "ingrate," accusing him of having violated union rules, and declaring that Cole should have been charged with violations a long time ago (C 28a). Cole was not allowed to speak, neither in answer to Hall's attack on him nor in support of his proposed resolution (C 12a, 33a). His resolution was put to a vote and was voted down by a hand vote, with the officials watching. All the members present except Cole and the seconder of his resolution voted against it.

Cole's resolution contained several "Whereas" clauses, of which two—the eighth and the ninth—were the subject of the charges subsequently filed against him. The eighth "Whereas" clause commented that "moral arguments

fabricated to justify SIU's [the petitioner-union's] interference in interunion beefs are both contradictory and phony," going on to cite as an example a bit of organizational warfare in which Paul Hall, as head of the petitioner-union, had sent strike-breakers, members of a dual organization that he had set up (known as the BME), through the picket lines of the Marine Engineers' Beneficial Association, the established marine engineers' union, and had thereby "stolen" the jobs of the striking engineers by capturing them for the BME (C 27a, 30a). The ninth "Whereas" clause criticized Paul Hall for having begun a pattern of "organizational hijacking" by a raid on a sister union, the NMU, in which Hall (and the SIU) had made offers to the employers to cut the daily wage rate aboard one vessel from $28.46 to $17.50 and the manning-scale from 11 men to 7, and to cut wages aboard another vessel in similar fashion, and reduce the manning-scale from 17 men to 11, all in order to take control of those vessels away from NMU (C 31a). Cole's resolution argued that these were bad practices that in the long run injured the union and its membership.

It is uncontested that what Cole said in the two "Whereas" clauses was factually true.[2]

[2]Cole testified to the underlying facts and his testimony was undisputed. Moreover, the expert witness called by defendants admitted some of the facts (relating to the engineers' dispute) and conceded that such practices were, or hypothetically would be, "a very bad policy" and "self-defeating" (App. in the Court of Appeals, 183a-184a).

As to the facts concerning the eighth "Whereas" clause (i.e., the engineers' dispute), see Appendix in the Court of Appeals, 121a-123a, 127a, 170a-173a, 128a, 183a, and Finding of Fact No. 13 (C 27a). As to the facts in the ninth "Whereas" clause (the cutting of wage and manning-scales), see App. in the Court of Appeals, 44a-45a, 164a-165a, 98a-106a).

On September 4, 1962, the union's Port Agent for the Port of New York, Joseph Di Giorgio, filed a "Charge Sheet" containing charges against Cole based upon the criticisms that were set forth in the eighth and ninth "Whereas" clauses of Cole's resolution. Specifically, the "Charge Sheet" alleged that Cole had violated Article XVI, Section 2, Paragraph (h) of the union's constitution in that, on August 6, 1962, at the Headquarters Meeting,

> ". . . John Cole deliberately and maliciously charged the Officers and Union in the following:
>
> "(a) Raiding a duly certified bargaining agent on contractual jurisdiction.
>
> "(b) Moral arguments fabricated to justify SIU's interference in inter-union's beefs are both contradictory and phony.
>
> "(c) Charged an Officer of this Union with the stealing of jobs from another union." (C 33a).

Paragraph "(a)" of the Charge Sheet referred to the ninth "Whereas" clause (summarized above) of Cole's resolution, which had criticized the raid on a sister union involving the cutting of wage rates and manning scales. Paragraphs "(b)" and "(c)" related to the eighth "Whereas" clause, dealing with the engineers' dispute. (C33a-34a).

Port Agent Di Giorgio's Charge Sheet was presented to a membership meeting on September 4, 1962 and accepted by a majority vote. On October 9, 1962, a Trial Committee, all of whose members had voted at the September 4, 1962 meeting to accept Di Giorgio's charges against Cole, was chosen to try him on those charges. The trial took place after the union's Vice President, Earl Shepard, had closeted himself alone with the Trial Committee for a certain period of time. Cole

submitted to the Trial Committee a written statement admitting that he had introduced the resolution but denying that anything in it constituted malicious vilification. (C 35a). There was no oral testimony.

The Trial Committee made a formal written recommendation that Cole be found guilty and expelled from membership; however, it disclosed no evidence to support a finding that Cole had committed either "malicious vilification" or any other alleged offense. (C 35a). Nevertheless, the recommendation was ratified by the union's membership meetings and took effect as an expulsion. Plaintiff pursued and exhausted all appellate remedies available to him within the union.

After exhausting his intra-union appeals, Cole instituted this action, in the United States District Court for the Eastern District of New York, on December 10, 1963. He promptly sought a preliminary injunction restoring him to membership; however because of the defendants' dilatory tactics described in the affidavits filed January 30, and February 3, 1964, hearing on his motion was delayed until the end of January. It was not until May 27, 1964 that the District Court, *per* Hon. John F. Dooling, Jr., USDJ, granted a preliminary injunction restoring Cole to union membership, conditioned upon his posting a $500 bond. Judge Dooling wrote a clear and concise opinion and made extensive factual findings, which supported the truth of what Cole had said in his challenged "Whereas" clauses and which demonstrated the factual basis for Cole's statements; *cf. Cole v. Hall*, 56 LRRM 2606 (ED. NY. 1964).[3]

---

[3]As regards the lengthy and voluminous argument presented by the union to dispute the accuracy of what Cole had said in his "Whereas" clauses. Judge Dooling observed in his Opinion:

The union required Cole not only to post the $500 bond before it would restore him to membership but also to pay all dues for the period of his expulsion (*cf.* Affidavit, BH Hall, 15th June 1964, filed 6-16-64, p. 5, in the Record). The union moved unsuccessfully to stay the preliminary injunction. After that motion was denied, it appealed to the Court of Appeals. The Court of Appeals unanimously affirmed Judge Dooling's decision: *Cole v. Hall*, 339 F.2d 881 (2nd Cir. 1964).

Filing of a note of issue was delayed at defendants' request until the last day permitted by the District Court's calendar order, so that defendants could serve interrogatories (Affid't, BH Hall, 24th Oct. 1966, filed 10-25-66, in the Record): it was finally filed September 30, 1965. Nearly a year later, in late September 1966, defendants served upon plaintiff 195 separately-numbered interrogatories, each containing several sub-sections, totalling more than 750 questions in all and filling 62 pages of legal-sized paper. Defendants, in October 1966, also moved successfully to remove the case from the trial calendar. After numerous motions and cross-motions, many of the interrogatories were stricken (cf. decision of Judge Rosling, filed 2-2-67). The other interrogatories were answered. Thereafter, the case was restored to the trial calendar. In June 1968, defendants demanded a deposition of the plaintiff; the deposition was taken, consuming three full days in addition to

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"[T]he facts . . . do not support the high tone taken for the union's policy, the Trial Committee's determinations, or the 'subversive' content or tendency of plaintiff's utterances. Rather, the [union's] argument reiterates the union officers' position as if that position was, necessarily and because it was theirs, true. . . ."

(*Cole v. Hall, supra*, 56 LRRM at 2607.)

several briefer sessions. In 1968 and 1969, the case was repeatedly set down for trial but not actually tried until January 1970. During this period prior to actual trial, the union's officers publicly announced their determination to effectuate Cole's expulsion or otherwise to "get rid" of him (Trial Transcript, pp. 850-851).

The case went on trial on January 12, 13, 19, 20 and 21, 1970 before Hon. Jacob Mishler, Chief USDJ. Judge Mishler handed down his decision on May 21, 1971, granting Cole a permanent injunction restoring him to membership rights (and thereby relieving Cole of the necessity any longer to maintain his $500 bond); it also awarded attorneys' fees; *Cole v. Hall*, 80 LRRM 2267, C 10a-21a. The union appealed and Judge Mishler's decision was unanimously affirmed by the Court of Appeals in an Opinion by Mr. Justice Tom C. Clark (Retired) of this Court, sitting as Circuit Judge; *Cole v. Hall*, 462 F.2d 777 (2nd Cir. 1972), C 2a-9a. It is that decision for which certiorari has been granted.

SUMMARY OF ARGUMENT

It is one of the inherent powers of equity to make an award of counsel fees in order to do justice. In particular, where the plaintiff's lawsuit has benefited persons other than himself and where the Court is enabled to make a fee award that will operate to spread the costs of the litigation among the persons benefited, failure to make an award would be to enrich the others unjustly at the cost of the plaintiff.

Here it is obvious that the plaintiff's lawsuit has benefited an entire class of persons, to wit: the union's members. At the time that the suit was brought, though

more than four years after passage of the LMRDA (or Landrum-Griffin Act), with its "Bill of Rights of Members of Labor Organizations," the officers of the petitioner-union believed—and they insist that they believed it in good faith—that they had the lawful power to expel any union member who dared to criticize them or their policies at a membership meeting of the union. It has taken this lawsuit to convince them that union members have rights, rights which they (the officers) are bound to respect. By forcing the officers to respect the rights of members, this lawsuit has conferred a substantial benefit upon every one of the union's members.

In line with established principle, the District Court has equitable power to make an award of attorneys' fees; this case is on all fours with *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161 (1939), and *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970). Here, as there, the persons benefited by the lawsuit each have an interest in a common fund, in this case the union treasury. (In *Mills, supra*, the common fund was the defendant corporation's treasury; in *Sprague*, supra, it was the proceeds of certain bonds held by defendant banks; in *neither* case was the common fund created by the lawsuit.) A fee award payable out of the common fund is not punitive, neither in fact nor intent; it operates to spread the expenses of the litigation among all the persons benefited by the lawsuit, so that the plaintiff will not, alone, have to bear the full cost of the litigation.

Congress intended that such fee awards would be available to plaintiffs in suits under Section 102 of the LMRDA. For that reason it used the most general possible language: it provided in Section 102 that a union member may sue "for such relief (including injunctions)

as may be appropriate." The sponsors of the Landrum-Griffin bill declared in plain language that the availability of fee awards to Section 102 plaintiffs was necessary in order to effectuate the purposes of the Act. And they were plainly right: Congress has relied upon ordinary union members to enforce the "Bill of Rights of Members of Labor Organizations" by private suit. Such private suits might never be brought or pursued to completion if there were no prospect of a fee award.

The need for such a fee award is made clear by the facts of this case. It has required nine years to reach completion; the defendant union has resisted it by every manner of dilatory tactics known to experienced counsel. The docket sheet in the District Court is already nine pages long. No monetary damages (other than the fee award) have been recovered. The plaintiff has secured a permanent injunction against his wrongful expulsion, but since he has retired from the industry it is obvious that the prospect of such purely injunctive relief would not have induced him to pursue the case to completion. In order that the statutory purposes be vindicated and the rights of all the union's members be protected, there must be reimbursement for the plaintiff-member's litigation expenses.

To require the plaintiff to bear all the expenses of litigation would be an obvious injustice. They should be spread among the persons benefited.

ARGUMENT

I

A FEDERAL COURT, SITTING IN EQUITY, HAS INHERENT POWER TO AWARD ATTORNEYS' FEES WHERE THE DOING OF JUSTICE SO REQUIIRES.

While it is generally true that attorneys' fees are not recoverable in an ordinary civil suit—such, for example, as a personal-injury tort action—it is firmly established that a federal district court, in its sound discretion, through its equity powers, may make a fee award where appropriate. *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161 (1939); *Mills V. Electric Auto-Lite Co.*, 396 U.S. 375 (1970). The courts have not hesitated to avail themselves of this inherent power where "overriding considerations indicate the need for such recovery" (*Mills v. Electric Auto-Lite Co., supra*, 396 U.S. at 391-392) or " when overriding considerations of justice seem to compel such a result" (*Fleischmann Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718 (1967)).

Such "overriding considerations" are present when, for example, the plaintiffs are persons of small means, pitted against a powerful labor union, and have been subjected to discrimination or oppression by that labor union; *cf. Rolax v. Atlantic Coastline R.*, 186 F.2d 473, 481 (4th Cir. 1951).

And the courts have, likewise, long held that such "overriding considerations" are present where the law-suit in question, brought by an individual, has conferred substantial benefit upon an identifiable class, and where the nature of the court's subject-matter jurisdiction enables it to make a fee award that will operate to

spread the costs among the members of the benefited class. The power of a federal court sitting in equity to make an award in such a case is "part of the original authority of the chancellor to do equity in a particular situation." *Sprague V. Ticonic Nat'l Bank, supra*, 307 U.S. at 166.

A. The *Mills* Case.

That principle has most recently been re-affirmed by this Court in *Mills v. Electric Auto-Lite Co., supra.* In *Mills*, certain minority shareholders of defendant corporation brought suit to set aside the latter's merger with another corporation, charging that the proxy solicitation for the merger vote was materially misleading and in violation of Section 14(a) of the Securities Exchange Act and of the rules issued thereunder. This Court upheld the District Court's summary judgment determination that the proxy solicitation did violate Section 14(a); it accordingly remanded the case for determination of what relief should be granted.

This Court went on to hold that the plaintiffs were entitled to an interim award of attorneys' fees for the reason that their lawsuit, though as yet incomplete, had rendered a substantial service to the corporation and its shareholders (*Ibid.*, 396 U.S. at 396). In so holding, the Court explored the decisions concerning fee awards where the plaintiff's lawsuit has benefited others in the same manner as himself. The Court noted that in such cases an award may be appropriate because to allow others to benefit from the plaintiff's efforts without contributing to the litigation expenses that produced that benefit "would be to enrich the others unjustly at the plaintiff's expense." *Ibid.*, 396 U.S. at 392.

The *Mills* opinion emphasized that the power to make a fee award is an integral power of an equity court. Indeed, the rule that this power should be exercised where an individual's lawsuit has conferred benefit or a service upon a class was expressly termed "judge-created." The conditions for its effectuation are, first, a substantial benefit resulting from the lawsuit and, second, the court's jurisdictional power to make an award that will operate to spread the costs proportionately among the members of the benefited class. (396 U.S. at 394).

Both conditions were present in *Mills*. First the benefit conferred: that benefit consisted in corporate "therapeutics," in requiring the officers of the corporation to recognize their duty to submit fair and non-misleading material to shareholders in connection with proxy solicitation. It was non-pecuniary in nature: no money was recovered either for the corporation or for its stockholders as a result of the lawsuit. But the lawsuit, in blocking a distortion of the corporation's voting process and in protecting the right of all shareholders to a fair and informed suffrage, conferred a substantial benefit both upon the majority shareholders (who had favored the proposed merger) and upon the minority (who opposed it).

Second, each of the persons benefited by the lawsuit (i.e., the shareholders of the corporation) had a material interest in a common fund, to wit: the corporation's treasury, and that common fund was within the Court's subject-matter jurisdiction. Hence the Court could make an award that would operate to spread the costs of the litigation proportionately among the persons benefited by the lawsuit.

This Court ruled, additionally, that a fee award should not be precluded by the absence of express authorization for such in the particular section of the statute upon which the lawsuit was grounded (*Ibid*, 396 U.S. at 390). Nor should it be precluded by the fact that, in two *other* sections of the same statute, Congress had expressly and specifically provided for fee awards (396 U.S. at 390-391). Moreover, citing *Bakery Workers Union v. Ratner*, 118 U.S.App. D.C. 269, 335 F.2d 691 (1964), the Court emphasized that one should not infer a Congressional purpose to circumscribe the power of a district court to grant a fee award, among other appropriate remedies, from a statute giving broad protection. *Mills, supra*, 396 U.S. at 391.

And again citing *Bakery Workers Union v. Ratner, supra,* this Court in *Mills* went on to say that:

> "... the stress placed by Congress on the importance of fair and informed corporate suffrage leads to the conclusion that, in vindicating the statutory policy, petitioners have rendered a substantial service to the corporation and its sharehholders."

Such a suit as was present in *Mills,* the court added, involves "corporate therapeutics" and furnishes a benefit to all shareholders by establishing rights valuable to all. As a result, the effect of a fee award payable out of the corporate treasury "is not to saddle the unsuccessful party with the expenses but to impose them on the class that has benefited from them. . . ." (Ibid., 396 U.S. at 396, 396-397).

B. The Importance of Fee Awards in Union Democracy Cases.

By citing in support of its holding (396 U.S. at 391, 396) the case of *Bakery Workers Union v. Ratner, supra,*[4] this Court in its *Mills* decision emphasized the substantial similarity between the stress placed by Congress on the importance of protecting the basic democratic rights of union members in Title I of the Landrum-Griffin Act, and the "stress placed by Congress on the importance of fair and informed corporate suffrage" in the Securities Exchange Act. (*Ibid.*, 396 U.S. at 396). Just as the petitioner stockholders in *Mills* were found to have rendered a substantial service to the corporation and its shareholders by vindicating the statutory policy at issue and the rights of other shareholders, so a plaintiff union member (such as John Cole), in vindicating statutory policy regarding union democracy and the rights of other union members, renders a substantial service to the union as an institution and to all of its members.

Senator McClellan made the point clearly when he introduced, in the Senate, the original version of the "Bill of Rights of Members of Labor Organizations." He said:

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[4]In *Ratner*, attorneys' fees were awarded to plaintiff union members in two cases that they had brought against their union under the LMRDA. One of the cases had been brought under Section 501 of the Act, the other brought (as the instant one is brought) under Section 102. *Cf. Ratner, supra,* 118 U.S. App. D.C. at 273, n. 9; 335 F.2d at 695, n. 9. The case brought under Section 102 was *Alvino v. Bakery Workers Union,* 46 LRRM 2812 (D.D.C. 1960). *Cf. Yablonski v. United Mine Workers*, 466 F.2d 424, 430 (D.C. Cir. 1972).

In *Ratner*, fees were awarded for both cases and the amount of the fees was not based upon the funds recovered.

"Mr. President, I testified before the Committee on Labor and Public Welfare generally.... At that time I made the statement,'I believe that if you would give to the individual members of the unions the tools with which to do it, they would pretty well clean house themselves.'

"If we want fewer laws–and want to need fewer laws– providing regulation in this field, we should start with the basic things. We should give union members their inherent constitutional rights, and we should, make those rights apply to union membership as well as to other affairs of life. We should protect the union members in those rights. By so doing we will be giving them the tools they can use themselves."
(II Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, 1102-1103.)

The stress that Congress placed upon the importance of protecting union members' democratic rights and, in particular, their rights of free speech within the union– needs no explanation. A labor union is an organizational expression of industrial democracy. But to be such it must, itself, be democratic. The AFL-CIO has declared, in Ethical Practices Code VI, approved by its Executive Council on May 23, 1957, to this effect:

"Freedom and democracy are essential attributes of our movement. Labor organizations lacking these attributes... are unions in name only. Authoritarian control... is contrary to the spirit, the tradition and the principles which should always guide our movement."

"AFL-CIO Codes of Ethical Practices" (Reissued, May 1958, pp. 44-45.)

When democrary in a union is suppressed and the union is surrendered to its officers' authoritarian

control, the union as such loses its legitimacy as part of the Labor Movement and of society.[5] Still worse,

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[5]The attorney for the Canadian Labor Congress, Maurice Wright, Q.C., made this clear in distinguishing free trade unions from a "hoodlum empire" that had attained dominance over Canadian seamen. He said, inter alia,

> "A trade union is a free association of workers who come together to improve their conditions of work and for other social purposes. . . . Some unions have more effective constitutional safeguards for the preservation of rank-and-file control than others. . . . But if an institution continues to function as a trade union, it must be a free association of workers.
>
> "The Seafarers' International Union of Canada, on the record—on the abundant and uncontroverted evidence before this Commission—is not a free association of workers. It is a captive legion of dragooned and helpless individuals. It is a racket; it is not a union. Like the constitution of the USSR, the constitution of the Seafarers' International Union of Canada makes profuse reference to the principles of democracy. . . . In both cases, behind the facade of the documents, there is the reality of totalitarian rule. . . .
>
> "The Seafarers' International Union is congenitally incapable of making a contribution to the labour movement. It has no ideas. Its leadership is, in the widest sense, unlettered. . . . Their weapons are clubs, not ideas. They are not of the labour movement—they are a growth upon it. . .
>
> " . . . Equally, we submit, that the S.I.U. is not a part of Canadian society—it is a growth upon it. We submit that your Lordship should be prepared to recommend whatever social surgery is necessary to relieve both the trade union movement and society from this growth. There is no place in our social structure for a hoodlum empire which works hand-in-glove with certain shipping companies to the advantage of both and to the disadvantage of the workers and the general public."
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> (*Extract from Hearing of Industrial Commission as to Shipping in the Great Lakes and St. Lawrence River System, March 13, 1963*, Canadian Labour Congress, pp. 5, 9, 33.)

And *cf.* generally: *Report of Industrial Inquiry Commission on the Disruption of Shipping*, July 1963, Queen's Printer, Ottawa, 1963.

it can no longer serve its legitimate purpose and, insofar as it represents an embodiment of Congress's labor relations policy, that policy is negated. Congress, by conferring upon each recognized or certified union the legal status of *exclusive* bargaining representative for all the workers in an administratively-established "bargaining unit" (29 U.S.C. § 159(a); 45 USC §§ 151, et seq.), "has seen fit to clothe the representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents." *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192, 202 (1944). But if the bargaining representative has freed itself from democratic control by the workers in the bargaining unit, then it is incapable of performing its quasi-legislative function; is more likely to become a vehicle for graft and corruption, for "sweetheart" dealing and betrayal of the workers whom it ostensibly represents—or, in simpler language, it becomes a "racket," a "hoodlum empire." Compare: *Schonfeld v. Raferty*, 271 F.Supp. 128 (SD. NY. 1967), aff'd 381 F.2d 446 (2nd Cir. 1967).

Precisely this problem was the subject of the investigations undertaken by the Select Committee on Improper Activities in the Labor or Management Field, headed by Senator McClellan in the late 1950s. The Committee determined, as a result of its investigations, that the way to drive corruption and racketeering out of the union establishment was by giving protection to rank-and-file democracy within the unions, by giving the union members "the tools they can use themselves," as Senator McClellan put it, the tools with which "they could pretty well clean house themselves," the tools "with which the unions can be

given back to them." And *cf.*: Interim Report of the Select Committee on Improper Activities in the Labor or Management Field, S. Rep. No. 1417, 85th Cong., 2nd Sess. (1958), p. 452.[6]

In response to the McClellan Committee's findings, Congress sought to attack corruption and racketeering by giving the union members those very "tools with which the unions can be given back to them." The most important of those tools, in the life of a labor union as in American society under the First Amendment to the United States Constitution, is the right of an ordinary man or woman, of a "rank-and-filer," to freedom of speech, freedom to criticize the persons in authority over him. And for that reason, Congress carefully guaranteed

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[6]The relationship that his Committee's investigations had revealed between graft, corruption and racketeering, on the one hand, and bureaucratic suppression of union members' freedom of speech within the unions, on the other, was pithily expressed by Senator McClellan when, in giving the Senate some examples of the "offenses" for which union members, under some union constitutions, could be punished, he came to disciplinary provisions making it an offense to criticize or question the motives of union officials. He commented at that point (II Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, 1104):

> " . . . 'criticizing union officials.'
>
> "The officials can say to a member, 'You had better not criticize a union official. You dare not criticize him. If you do, you can be expelled. No wonder they get by stealing so much from their fellow members. Or 'questioning the motives or questioning the integrity of an officer or a member of a committee.'
>
> "In other words, a union member dare not question the integrity of an officer. In some unions, if a member does that, he can be expelled.
>
> "I say we must give the members of the union the tools with which the unions can be given back to them."

to union members freedom of speech both inside and outside the union; it provided that "Every member of any labor organization shall have the right . . . to express *any* views, arguments or opinions; and to express at meetings of the labor organization *his* views . . . upon *any* business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings. . . ." (Section 101(a)(2) of the LMRDA, 29 U.S.C. 411(a)(2).) (Emphasis supplied.)

But use of those "tools" to clean house in the unions requires that members of the unions be protected, and know that they are protected, against organizational reprisals, not only by guarantees contained in a statute but also by recognition of and respect for their basic democratic rights on the part of the persons in power in the unions. When a union member is expelled for introducing a resolution on union policy at a union meeting, the rights of all members are threatened. When the expelled member, by bringing suit, demonstrates that the Congressional guarantee of freedom of expression has genuine meaning, all members gain an increased sense of freedom—and are enabled to use that "tool" for the purposes that Congress intended. One member, by insisting on his right of free speech, wins free speech for all fellow members. All members of this union are today shielded in their exercise of that "tool" by the suit that one member, John Cole, brought and has pursued for more than nine years.

But without the availability of a fee award, there is scant possibility that suits such as John Cole's would be brought and pursued to completion over the strenuous and dilatory opposition of entrenched union officials, armed with the resources of a vast union treasury. As the

Court of Appeals for the Eighth Circuit said in *Johnson v. Nelson*, 325 F.2d 646, 653 (1963), under the circumstances of that case[7] "denial of relief [in the form of counsel fees] . . . would discourage resort to the courts by union members to establish their Title I rights."

The Supreme Court of Oregon, sitting *en banc*, has expressed much the same view. In *Gilbert v. Hoisting & Portable Engineers, Local 701*, 237 Or. 139, 390 P.2d 320, 321 (1964) (*en banc*), the Court said:

> "If those who wish to preserve the internal democracy of the union are required to pay out of their own pockets the cost of employing counsel, they are not apt to take legal action to correct the abuse. The elimination of improper practices in union affairs benefits not only the plaintiff who initiates the suit but also inures to the members of the union and the public as well. The cost of employing counsel should not be visited upon the persons who bring the suit and prevail."

Like the shareholders' suit that was before this Court in the *Mills* case, *supra*, a union member's suit under Section 102 of the LMRDA, brought to vindicate rights guaranteed to union members under the "Bill of Rights of Members of Labor Organizations," is "therapeutic." It helps to maintain the health of our labor relations system.[8] Such "therapeutics" are made possible by the

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[7] In *Johnson*, union members wrongfully expelled had brought suit under Section 102 of the LMRDA for reinstatement and succeeded. The union membership voted to reimburse them their counsel fees but the officers refused to pay the money over. They therefore brought suit under Section 501 of the Act to compel payment of the counsel fees incurred in their Section 102 suit.

[8] Cf. the article by Professor Hornstein that was cited in the *Mills* decision: Hornstein, "Legal Therapeutics: the 'Salvage' Factor

prospect of a fee award. As Judge Levet of the Southern District of New York pointed out in *Cutler v. American Fed'n of Musicians*, 231 Supp. 845, 849-50 (1964),

> "With the possible exception of civil rights litigation, no area is more susceptible to the salutary effects of the exercise of the chancellor's power to award counsel fees without the presence of a fund than litigation involving a member and his union. Primarily, this litigation seeks solely equitable relief and traditionally pits an impecunious group of members against a solvent union with little expectation of a substantial monetary award from which to pay a counsel fee, even a contingent one.

It is hardly surprising, therefore, that the only Court of Appeals that has ever, since passage of the LMRDA, ruled that attorneys' fees may *not* be awarded in Section 102 cases—namely, the Sixth Circuit in *McCraw v. United Association of Journeymen, etc.*, 341 F.2d 705, 710 (1965)—has recently retreated from that position and, in *Sertic v. Cuyahoga, Lakes, etc. Carpenters District Council*, 459 F.2d 579, 583 (1972), indicated its readiness to join those other circuits that have ruled that counsel fees *are* awardable.

Nor is it surprising that five other Circuit Courts of Appeals have ruled that counsel fees may be awarded to plaintiff union members in cases brought under Section

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in Counsel Fee Awards," '69 Harv. L. Rev. 658, 662-663 (1956). Said Professor Hornstein,

> "They [derivative suits] are therapeutic, helping to maintain the health of our corporate system. . . . Every successful suit duly rewarded encourages other suits to redress misconduct and by the same token discourages misconduct which would occasion suit. There can be no doubt that these derivative suits have materially raised the standards of fiduciary relationships and of other economic behavior."

102 of the LMRDA. In chronological order, the five circuits are:

The Third Circuit: *Gartner v. Soloner*, 384 F.2d 348 (1967), cert. den., 390 U.S. 1040 (1968).

The Fifth Circuit: *Burch v. Int'l Ass'n of Machinists*, 454 F.2d 1170 (Dec. 10, 1971).

The Second Circuit: *Cole v. Hall*, 462 F.2d 777 (June 22, 1972) (the instant case).

The District of Columbia Circuit: *Yablonski v. United Mine Workers*, 466 F.2d 424 (August 3, 1972).

The Ninth Circuit: *Kerr v. Screen Extras Guild*, 466 F.2d 1267 (Sept. 20, 1972).

The circuit courts themselves have thus united in holding that fee awards are appropriate in suits brought by union members under Section 102. There is no longer any conflict among them on this issue. And *cf.: Rolax v. Atlantic Coastline R., supra*, 186 F.2d 473 (4th Cir. 1951); *Johnson v. Nelson, supra*, 325 F.2d 646 (8th Cir. 1963); and *Simmons v. Avisco, Local 713*, 350 F.2d 1012 (4th Cir. 1965).

C. The *Fleischmann* Case

The petitioner-union would counterpose against the *Mills* case, *supra*, the slightly older case of *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714 (1967), a suit brought by one corporation against another, seeking treble damages plus profits, plus costs, under Section 35 of the Lanham Act, 15 U.S.C. §1117, for infringement by defendant corporation of its trademark. The *Fleischmann* case, however, is inapplicable for the following reasons:

1. Unlike *Sprague* and *Mills, supra, Fleischmann* was not a case in which a lawsuit brought by one member of an identifiable class or group conferred benefits upon the entire class. The plaintiff was the corporation whose trademark was infringed. It (and its shareholders[9]) were the only possible beneficiaries of the litigation. As this Court carefully pointed out in distinguishing the line of cases then most prominently headed by *Sprague, supra* (and since joined by *Mills*), "none of the considerations which supported the exception recognized in Sprague are present here" (*Fleischmann, supra,* 386 U.S. at 720).

2. The statute under which the suit was brought prescribed in intricate detail the remedies for the specific right sued upon. As this Court described them (*Ibid.*, 386 U.S. at 719),

> ". . . in the Lanham Act, Congress meticulously detailed the remedies available to a plaintiff who proves that his valid trademark has been infringed. It provided not only for injunctive relief, but also for compensatory recovery measured by the profits that accrued to the defendant by virtue of his infringement, the costs of the action, and damages which may be trebled in appropriate circumstances."

As the Court noted, this was a setting in which "the legislature ha[s] prescribed intricate remedies" (386 U.S. at 719); the very intricacy of the remedies specifically provided indicates that "Congress intended §35 of the Lanham Act to mark the boundaries of the power to

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[9]If the shareholders of the *plaintiff* corporation be viewed as beneficiaries of the lawsuit, then it must be answered that the costs of the litigation had already been spread among them, by the simple fact of the expenses having been paid out of the plaintiff corporation's treasury. No judicially-directed fee award was necessary to accomplish that spreading.

award monetary relief arising under the Act" (386 U.S. at 721).[10]

That the remedies provided by Section 35 of the Lanham Act are in fact "intricate" needs no elaboration; it is hard to imagine another area of law where the court is directed to award damages, and to increase them up to treble their sum, *in addition to* awarding profits, which it may take as actual profits or as a profit-figure of its own discretionary determination. In exploring the reach of Section 35, we are in an area wholly preempted by the precise statutory formulae. Those formulae mark clear and definite boundaries.

By contrast, there is no "intricacy" at all in the range of Section 102. In providing for "such relief as may be appropriate," Congress explicitly left the determination

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[10]Section 35 of the Lanham Act, 15 U.S.C. §1117, provides as follows:

> "When a violation of any right of the registrant of a mark registered in the Patent Office shall have been established in any civil action arising under this Act, the plaintiff shall be entitled, subject to the provisions of sections 29 and 32, and subject to the principles of equity, to recover (1) defendant's profits, (2) any damages sustained by the plaintiff, and (3) the costs of the action. The court shall assess such profits and damages or cause the same to be assessed under its direction. In assessing profits the plaintiff shall be required to prove defendant's sales only; defendant must prove all elements of cost or deduction claimed. In assessing damages the court may enter judgment, according to the circumstances of the case, for any sum above the amount found as actual damages, not exceeding three times such amount. If the court shall find that the amount of the recovery based on profits is either inadequate or excessive the court may in its discretion enter judgment for such sum as the court shall find to be just, according to the circumstances of the case. Such sum in either of the above circumstances shall constitute compensation and not a penalty."

of appropriate relief to the district courts, without any limitation whatsoever.

The basic distinction between this case and the *Fleischmann* case is the one first-mentioned: that a union member's suit under Section 102 vindicates rights guaranteed to all union members by the "Bill of Rights of Members of Labor Organizations" (Title I of the LMRDA), and therefore benefits not only himself but all other union members as well, while suits under Section 35 of the Lanham Act benefit only the plaintiff—and confer not even a theoretical benefit upon any other persons among whom a fee award could operate to spread the costs of litigation. But even beyond this, the contrast between the *Fleischmann* situation and the present one remains clear and distinct. Congress, in Section 35 of the Lanham Act, specifically limited the type of relief that could be awarded to a successful plaintiff; it deliberately marked the boundaries of relief. In Section 102 of the LMRDA, however, Congress used deliberately *general* language: it marked no boundaries and left the courts free to "determine whether the special circumstances exist that would justify an award of attorneys' fees" or of any other appropriate relief. (*Cf. Mills v. Electric Auto-Lite Co., supra,* 396 U.S. at 391.)[11]

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[11] A further and even more basic distinction should be pointed out between that line of cases that regards attorneys' fees as an element of compensatory damages and that which places an award of fees within the general powers of a court of equity. The distinction was made clear in *Vaughan v. Atkinson,* 369 U.S. 527, 530 (1952), which, though it belongs to the first (damage) line of cases, cited with approval (and distinguished) the *Sprague* and *Rolax* cases, *supra,* as examples of the second (or equity) line of cases. In *Fleischmann, supra,* the distinction was pointed out again (386 U.S. at 718-719).

II.

IN ENACTING THE L.M.R.D.A. AND ITS "BILL OF RIGHTS OF MEMBERS OF LABOR ORGANIZATIONS," CONGRESS DID NOT INTEND TO DEPRIVE FEDERAL DISTRICT COURTS OF THEIR INHERENT POWER TO AWARD COUNSEL FEES IN APPROPRIATE CASES.

The Petitioner mistakes the issue raised by it when it argues in its brief (page 10, et seq.) that the language of Section 102 of the LMRDA, or its legislative history, is such as to indicate that Congress did not intend to "authorize" the award of counsel fees in Section 102 cases. For even if its argument to that effect were sound, it would not meet the burden that the Petitioner must carry in this case.

The issue here is not whether Congress intended to confer upon the federal courts a power that the courts would not otherwise possess. The issue, instead, is whether Congress, in enacting the "Bill of Rights of Members of Labor Organizations" as Title I of the LMRDA, intended *to deprive* the federal courts of a power that they already possessed as a concomitant of their role as courts of equity.

Since, in *Fleischmann, supra,* the only genuinely arguable basis for a fee award was the first (or damages) line of cases, the issue was weighed and decided in terms of damages (*cf. ibid.*, 386 U.S. at 721).

On the other hand, the issue raised here derives from the second, or equity, line of cases—namely, that represented by *Sprague, Mills,* and *Rolax, supra.* Where a fee award is made under the general powers of a court of equity in order to spread the costs of litigation among the persons benefited by the litigation, it is not an item of damages; damage-considerations have nothing to do with it.

It has been shown above that a federal court, sitting in equity, has inherent power to award counsel fees to a plaintiff whose lawsuit has helped to effectuate a statutory or other public policy and which has, by so doing, conferred substantial benefit upon the members of an identifiable class.[12] The power of a federal court to make such an award is not dependent upon the presence or absence of an express statutory authorization. It resides in the federal courts in suits brought pursuant to statute *unless* it can be shown that Congress, in providing specific and exclusive remedies, evidenced "a purpose to circumscribe the courts' power to grant appropriate remedies." *Mills v. Electric Auto-Lite Co., supra,* 396 U.S. at 391.

It is clear both from the language of the LMRDA and from its legislative history that Congress had no such circumscribing purpose.

A. The Statutory Text

We look first to the language that Congress itself used in drafting the Act. Section 102 of the Act, 29 U.S.C. 412, provides that a person whose rights under Title I have been infringed "may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate."

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[12] The instant lawsuit, like the *Mills* suit, has served both these functions. It has vindicated the Congressional policy that every union member shall have freedom "to express at meetings of the labor organization his views . . . upon any business properly before the meeting. . . ." (Section 101(a)(2) of the LMRDA, 29 U.S.C. 411(a)(2)). By vindicating that policy it has provided for the protection of all members of this union.

The broad nature of that grant of jurisdiction is apparent. More all-inclusive words could scarcely be written. Congress plainly did not seek to delimit or narrow the range of relief that a federal court might award to a plaintiff; it appears obvious that its broad grant was not intended to deprive the courts of their inherent power to award whatever traditional forms of relief (including attorneys' fees) they found appropriate.

That conclusion is reinforced by the express terms of the section immediately following (Section 103 of the Act, 29 U.S.C. 413):

> "Nothing contained in this subchapter shall limit the rights and remedies of any member of a labor organization under any State or Federal law or before any court or other tribunal, or under the constitution and bylaws of any labor organization."

And in addition to the specific savings clause for Title I, set forth in Section 103, *supra,* the LMRDA contains a general savings clause in Section 603(a), 29 U.S.C. 523(a), providing that

> "except as explicitly provided to the contrary, nothing in this chapter shall take away any right or bar any remedy to which members of a labor organization are entitled under any Federal law or law of any State."

Thus, the bare language of the Act, both of the section under which suit is brought and of the two separate sections in which Congress saw fit to state that it did not intend to take away any existing rights or remedies, is persuasive evidence that in enacting the LMRDA Congress did not intend to deprive the federal courts of their inherent power to award attorneys' fees.

B. The Legislative History

Congress passed the LMRDA in a "heavy pressure atmosphere" (*Gartner v. Soloner*, 384 F.2d 348, 355 (3rd Cir. 1967), cert. den. 390 U.S. 1040 (1968)). And it did so in a disjointed manner. Congressman Griffin, a few days after the Act became law, referred to it as a "scissors and paste" job. (Address by Robert P. Griffin, Labor Law Section of the Michigan State Bar, Annual Meeting, Sept. 25, 1959, quoted in Smith, The Labor Management Reporting and Disclosure Act of 1959, 46 Va. L. Rev. 195, 197 (1960).)

The original bill was amended repeatedly and re-amended. The "Bill of Rights of Members of Labor Organizations" was added to the original Kennedy-Ervin bill on the floor of the Senate, then itself amended. After the bill had passed the Senate, the House Committee on Education and Labor took up the lead. The Committee majority proposed a bill sponsored by Chairman Elliott, HR 8342; but a minority on the Committee opposed the Elliott bill and favored, for reasons set forth in their statement of "Dissenting Views" in the Committee's report, the twin bills of Congressmen Landrum and Griffin, H.R. 8400 and H.R. 8401. On the floor of the House the Committee's minority triumphed. The House deleted the entire text of the Elliott bill (H.R. 8342) following its enacting clause and replaced it by the text of the Landrum-Griffin bill, H.R. 8400. With some further changes, the substance of the Landrum-Griffin bill ultimately became enacted as the Labor-Management

Reporting and Disclosure Act of 1959, 29 U.S.C. 401, et seq.[13]

In tracing the legislative purpose through such a history one can, of course, approach confusion. The simplest guide through the maze is to look at what the Congressmen who sponsored the bills that eventually became the LMRDA—and, in particular, at what Congressmen Landrum and Griffin—actually desired and intended. One conclusion that becomes obvious is that there was a total *absence* in Congress of any desire to strip the federal courts of their power to make counsel fee awards in Section 102 cases; instead, the Congressmen who played major roles in formulating the LMRDA as enacted believed strongly that such fee awards *must* remain available to union members suing under Section 102 in order that the basic purposes of the Act might be accomplished. This is shown by the very passages quoted in Petitioner's brief (see esp. pp. 13, 14). It is obvious from those passages that Senator Goldwater, Congressman Griffin, and the other Congressmen (in addition to Griffin) who comprised the minority on the House Committee, strongly *favored* the availability to plaintiffs under Section 102 of broad relief, including counsel fees. They *did not favor* restricting the relief available to such plaintiffs; indeed, they declared that any bill which failed to make fee awards available to such plaintiffs would be "woefully inadequate."

[13] The legislative history of the LMRDA is collected in a two-volume work published by the U.S. Department of Labor in 1960, entitled *Legislative History of the Labor-Management Reporting and Disclosure Act of 1959*. Volume I contains the text of the various bills and committee reports involved in that history; Volume II contains the record of the House and Senate debates. The work is cited below in abbreviated form as Leg. Hist. of the LMRDA.

The original Committee bill, H.R. 8342, sponsored by Congressman Elliott and the majority of the House Committee, contained an enforcement clause (also denominated as Section 102) which provided that a person who is aggrieved by a violation of Section 101 and who has exhausted his intra-union remedies "may bring a civil action" in federal district court; as to remedy, it provided that

> "(b) If, upon a preponderance of the evidence after a trial upon the merits, the court finds that a violation of section 101 has occurred, the court shall have jurisdiction to restrain such violation and to grant such other and further relief as may be appropriate."
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> (I Leg. Hist. of the LMRDA 701.)

Congressman Elliott, in describing the intended reach of that clause, told the House (II Leg. Hist. of the LMRDA 1584) that:

> "The court's jurisdiction '* * * to grant such other and further relief as may be appropriate' gives it a wide latitude to grant relief according to the necessities of the case."

Several Republican members of the House Committee on Education and Labor attacked Congressman Elliott's bill as not going far enough. They filed a statement of "Dissenting Views" in the House Report on the Elliott bill, H. Rep. No. 741, in which they set forth their criticism and their intention. At the end of their "Dissenting Views," they declared as follows:

> "For the reasons outlined above, we intend to support on the floor of the House the so-called Landrum-Griffin bill (H.R. 8400 and H.R. 8401). Only in this way, we are convinced, can we enact

legislation adequate to protect the working men and women of America, and the public they serve, against corrupt union officials."

(I Leg. Hist. of the LMRDA 856.)

What were the "reasons outlined above" that cause them to support the Landrum-Griffin bill against the Elliott bill? One of the reasons, and the most relevant here, was concern that the district courts in Section 102 cases should retain the power to award counsel fees to plaintiff union members. In their "Dissenting Views" they stated very forcefully that failure to make such fee awards available to union members who bring suit under Section 102 would be a "most serious inadequac[y]"; their belief that the Elliott bill contained that and other "most serious inadequacies" was precisely their stated reason for rejecting it and favoring the Landrum-Griffin bill (I Leg. Hist. of the LMRDA 853; see page 14 of the Petitioner's brief, where this paragraph of their statement of "Dissenting Views" is quoted). They feared that the Elliott bill, which was backed by the Committee majority, would not allow federal courts to make fee awards to union members. They believed strongly that counsel fee awards should be available. And this, itself, was one of the principal reasons "outlined above" that led them to support the Landrum-Griffin bill.[14]

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[14] Section 102 of the Landrum-Griffin bill, first sentence, read as follows:

"Any person whose rights secured by the provisions of this title have been infringed may bring an action in a district court of the United States for such relief as may be appropriate."

(See: I Leg. Hist. of the LMRDA 631.)

The views of the nine minority Congressmen concerning the inadequacies of the Elliott bill do not, of course, provide authoritative guide as to what the Elliott bill intended—nor do Senator Goldwater's criticisms of the Senate bill provide authoritative guide as to what the Senate bill intended. (Senator Goldwater, a month before he made the statement in testimony before the House Committee that is quoted in Petitioner's brief (II Leg. Hist. of the LMRDA 1281) had cast the sole vote in the Senate *against* the Senate Bill (II Leg. Hist. of the LMRDA 1257).[15] They spoke as opponents of the Elliott bill and of the Senate bill, expressing their fears that the relief provided by the bills might not be adequate. As this Court pointed out,

> "The fears and doubts of the opposition are no authoritative guide to the construction of legislation. It is the sponsors that we look to when the meaning of statutory words are in doubt."
>
> (*Schwegmann Bros. v. Calvert Corp.*, 341 U.S. 384, 394-395 (1951); And *cf.: Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 288 (1956).

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[15] The Court of Appeals for the Third Circuit, in *Gartner v. Soloner, supra*, 384 F.2d at 352, in analyzing the circumstances underlying Senator Goldwater's testimony, commented as follows:

> "Senator Goldwater's sincere statement did point up the need of enabling a single member to enforce his rights. It did not attempt to analyze the efficacy of the phrase used to cover the relief which might be needed including counsel fees. The Senator's offhand thought was that '* * * the bill does not grant him [a union member suing under Section 102], even where successful in his suit, reasonable counsel fees or other costs.' Leg. Hist., Vol. II, p. 1281. Yet many forms of relief and costs have been recognized under Section 102. . . ." (citing cases).

As to the intendment of the Elliott bill and of the Senate bill one must look to the statements of their sponsors. And they, as Congressman Elliott put it, intended Section 102 to give the courts a "wide latitude" to grant relief to union members

However, the statement of "Dissenting Views" made by the Republican minority of the House Committee (a minority which included Congressman Griffin) does emphasize the concern with which those Congressmen viewed the fee award question: they believed that any labor-reform legislation that failed to make counsel fee awards available to union members suing for relief from infringement of their basic rights would be "woefully inadequate" (I Leg. Hist. of the LMRDA 852). To overcome such inadequacies as that, they opposed the Elliott bill (H.R. 8342) and favored the Landrum-Griffin bill (H.R. 8400).

The nine Republican Committee members, including Congressman Griffin, announced their intention to support the Landrum-Griffin bill, in their statement of "Dissenting Views" (quoted *supra*). And they did precisely what they said they would do. On the floor of the House, every one of those nine Congressmen (including Congressman Griffin) voted to delete the entire text, after the enacting clause, from the Elliott bill (H.R. 8342) and replace it with the entire text of the Landrum-Griffin bill (H.R. 8400). And their proposal carried (II Leg. Hist. of the LMRDA 1691-1692). The bill that passed the House was in all important respects the Landrum-Griffin bill.

Plainly, Congressman Griffin and the others who backed the Landrum-Griffin bill favored the availability to plaintiffs in Section 102 suits of counsel fee

awards. It is also apparent that Congressman Elliott and those who supported his bill favored such availability. So did Senator Goldwater. One is led to ask, who in Congress did *not* favor availability of fee awards in Section 102 suits? Or, who in Congress favored depriving the federal courts of the power to make such awards in Section 102 suits? The answer appears to be: nobody. Petitioner has failed to find a single one. In its brief, Petitioner is able to quote only from persons who wanted to *preserve* to the federal courts in Section 102 cases the power to make fee awards; it can find *nobody* who wanted to take that power away from the courts. In the whole of the Eighty-Sixth Congress it can find nobody at all who favored prohibiting such awards.

C. The Fact That Counsel Fees Are Specifically Provided for in Other Sections Does Not Preclude Fee Awards Under Section 102.

At pages 16-17 of its brief, Petitioner points out that attorneys' fees are specifically provided for in Sections 201(c) and 501(b) of the LMRDA, 29 U.S.C. 431(c) and 501(b). The first of these sections authorizes suit by a member to examine books, records and accounts necessary to verify the financial reports filed by his union with the Secretary of Labor pursuant to Title II of the Act. The second authorizes union members to seek relief for the benefit of the union, to redress violations by union officers of their fiduciary duties, providing that a reasonable part of any moneys recovered for the benefit of the union may be allotted to pay counsel fees. It will be noted that these two sections refer to special situations which of necessity require specific provisions. They do not vest general equity powers in the forum

court. It should also be noted that these are the only sections of the LMRDA that explicitly authorize suit in state as well as in federal courts. State jurisprudence in this area is sketchy and was even more so in 1959; Congress could justifiably assume that a federal court would have no difficulty in making fee awards but could not be equally confident about the courts of all the states. See: Etelson and Smith, "Union Discipline under the Landrum-Griffin Act," 82 Harv. L. Rev., 727, 765-766 (1969).

Petitioner argues that by specifically mentioning counsel fees in Sections 201(c) and 501(b) but not mentioning them specifically in Section 102, Congress intended that they not be available under Section 102. A similar argument was made in *Mills v. Electric Auto-Lite Co., supra.* It was there pointed out that attorneys' fees were specifically provided for in Sections 9(e) and 18(a) of the Securities Exchange Act but were not specifically mentioned in Section 14(a) of the same Act. Hence it was argued in *Mills* that they should not be available in suits under that section. This Court emphatically rejected that argument:

> "We agree with the Second Circuit that the specific provisions in §§9(e) and 18(a) should not be read as denying to the courts the power to award counsel fees in suits under other sections of the Act when circumstances make such an award appropriate, any more than the express creation by those sections of private liabilities negates the possibility of an implied right of action under §14(a)."

The same is obviously applicable here. Not only are counsel fees not specifically provided for in Section 102; the same can be said of monetary damages of all kinds–of compensatory damages for loss of earings,

emotional suffering, etc., as well as punitive damages. Yet it is obvious that Congress intended such relief to be included within the phrase, "such relief as may be appropriate." The Court of Appeals for the Third Circuit, in *Gartner v. Soloner, supra,* 384 F.2d at 353 stated the obvious when it said, "The fact that other sections of the LMRDA specifically call for the awarding of counsel fees in no way controls the legislative intent with respect to Section 102."

In the case of the LMRDA, it is important to ensure that, in construing legislative intent with regard to one section, undue emphasis is not given to the language of other sections. In view of the disjointed or "scissors and paste" way in which the LMRDA as a whole, and especially its "Bill of Rights of Members of Labor Organizations," were put together, one should not expect technical consistency from title-to-title. That is especially true of Title I—the "Bill of Rights of Members of Labor Organizations"—for it was introduced originally as an amendment on the floor of the Senate, was patched and re-written during the course of debate, and adopted without ever being carefully integrated with the rest of the statute, which had not yet been debated.

Professor (subsequently Solicitor General) Archibald Cox put the matter clearly when he stated in an authoritative article:

> "[B]ecause much of the bill was written on the floor of the Senate or House of Representatives and because many sections contain calculated ambiguities or political compromises essential to secure a majority . . ., the courts would be well advised to seek out the underlying rationale without placing great emphasis upon close construction of the words."

Cox, "Internal Affairs of Labor Unions Under the Reform Act of 1959," 58 Mich. L. Rev. 819, 852 (1960).

III.

THE SUBSIDIARY QUESTIONS RAISED BY PETITIONER ARE IRRELEVANT TO THE ISSUE NOW BEFORE THE COURT.

The petitioner-union argues, as subsididary questions, certain other matters which can best be dealt with seriatim under one general heading. They are:

(i) The fact that some unions (not including Petitioner) are small and/or poor;

(ii) the fact that in this case, in declining to award punitive damages, the District Court ruled that plaintiff had failed to make sufficient showing of malice to justify punitive relief;

(iii) the fact that, in its ruling cited under (ii) above, the District Court found that defendants believed that they could punish Cole because of his having introduced a resolution at a union meeting; and

(iv) the possibility that Cole might have been motivated by "political ambitions."[16]

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[16] The "ambitions" referred to are Cole's aspirations to union office—i.e., to an office currently held by one or another of the incumbent officers of this union. Petitioner would suggest that such an aspiration is somehow not in accord with good faith. That very suggestion reveals far more about the prejudices of the union's entrenched officials than it does about the facts of this case. The reality is that there is not now nor has there ever been, at any stage in this case, any question raised as to John Cole's complete good faith in bringing and pursuing his lawsuit, in exhausting his union remedies prior thereto, or in any of the incidents that led to the bringing of this lawsuit. It may be added that the union's effort to cast a cloud on Cole's good faith by asserting that the Court made no specific finding of good faith is patently ridiculous.

An additional question suggested by the second of the two questions stated by Petitioner in its Petition for Certiorari (and subsequently certified for argument in this Court) appears to have been abandoned by Petitioner. That is the question of whether fees should be awarded where no monetary damages have been recovered by the plaintiff. Since Petitioner in its brief makes no mention of that question in its brief, it will not be specifically explored here.

What is most noticeable about all these subsidiary questions is that, to the extent that any of them have any relevance at all to the determination of a fee award, they are matters best addressed to the sound discretion of a district court—and may be presumed to have been disposed of once the district court has exercised its discretion; *cf. Sprague v. Ticonic Nat'l Bank, supra,* 307 U.S. at 164, 167.

However, the four questions raised by Petitioner will each be dealt with below.

A. The Small Size of Some Unions

The Petitioner tells us, correctly, that there exist many unions that are very small in membership and have "limited treasuries" (Petitioner's Brief, pp. 19-21). Petitioner does not assert that it is in that situation; it asserts simply that some unions are—and argues from this that fee awards to reimburse a plaintiff union member under Section 102 should not be made. Secondarily, it argues that small unions sometimes make innocent, or technical, mistakes in their disciplinary proceedings and for that reason, also, there should be no fee awards.

It is obvious that in this case there was no technical or innocent mistake. We will later take up the question of

whether the union's officials believed, in the face of the LMRDA, that they had the lawful right to expel a member for introducing a resolution at a union meeting. It is enough to add that, in addition to the obvious wrongfulness of such an expulsion, in this case there was *no evidence at all* to support a charge that Cole was guilty of "malicious vilification" or of any other offense within the range of the charge sheet filed against him (C 35a). The officers of the union, in short, expelled Cole on no evidence at all, for having dared to oppose them at a union membership meeting. They could not have failed to know that what they were doing was wrongful.

In other words, far from committing some technical or minor error in their explusion of Cole, the officers of the petitioner-union used the facade of a disciplinary proceeding in order to cloak an essentially totalitarian act. The officers' real reason for the proceeding was their desire to silence Cole. They sought to silence him because Cole's charges against them, being true and factually well-supported, were essentially unanswerable.

Nevertheless, we have still not considered the hypothetical situation posed by Petitioner's argument. What if a small union (*un*like Petitioner), being poorly advised or perhaps not advised at all by counsel, were to commit some minor or technical error in an otherwise-proper proceeding? The first answer to such a (hypothetical) question is that international unions exist precisely to provide protection in such matters—and so does the proviso to Section 101(a)(4) of the LMRDA, 29 U.S.C. 411(a)(4), requiring a union member to exhaust reasonable intra-union appeals before bringing suit. By appealing to the international union, the wronged member gives the higher bodies of his union, advised by able counsel, an opportunity to correct the error and make litigation unnecessary.

A second answer is that a fee award in litigation of this sort is made where the nature of the lawsuit—i.e., its attack upon some substantial (and not merely technical) injustice—results in substantial benefit to the plaintiff-member's fellow-members. It is not clear that the hypothetical situation suggested by Petitioner's argument would fit this requirement. At any rate, we may be confident that the District Court, sitting in equity, would fairly weigh the substantiality of the benefit conferred by the litigation in question and, additionally, would give due attention to the particular facts involved in the case, in determining to what extent the plaintiff-member should be reimbursed by his fellow-members for his litigation expenses.

But the short answer to Petitioner's hypothetical argument remains the obvious one: none of the considerations raised by Petitioner is operative here. In this case, the union is neither small nor poor. Its treasury is not "limited." And here there was no mere minor, technical, innocent error committed. Instead, the union's officers deliberately expelled a union member in order to stifle his criticism of them and of their anti-trade union practices. By blocking the expulsion, and by opening up to all members their freedom to openly oppose the union's officers, the plaintiff's lawsuit has conferred a valuable and substantial benefit upon all his fellow members.

B. The Fact That the Evidence of Malice on the Part of the Union's Officers Was Insufficient To Justify Punitive Damages.

The District Court made no formal finding, in connection with the fee award, as to whether in expelling Cole, the union's officers acted with or without malice, nor as to whether the union's officers knew or did not know that they were acting unlawfully. The District Court was plainly right not to do so. For if the award of a counsel fee is to be made in order to spread the costs of the litigation equally or proportionately among the persons benefited by the litigation–i.e., among the members of the Union–then the issue is solely between the plaintiff and his fellow-members. The union is involved in the "spreading" process only as a conduit. And it is of no matter whether the officers of a conduit acted, in committing the wrong that gave rise to the lawsuit, with or without malice.

The District Court did go into the "malice" question, however, in a different context. The plaintiff had demanded punitive damages, based upon an assertion of malice. Measuring this claim against the strict evidentiary test that is suitable for a punitive claim, as opposed to a compensatory one, the Court found proof of malice insufficient (C 38a). In its Opinion, it set forth the meaning of its finding (C 19a) as follows:

"PUNITIVE DAMAGES

"The court finds that the defendants, in good faith, believed that they had a right to charge and discipline the plaintiff for his actions at the meeting of August 6, 1962. Absent a showing of malice, punitive damages are not recoverable. *International*

Bhd. of Boilermakers v. Braswell, 388 F.2d 193 (5th Cir. 1968); *Farowitz v. Associated Musicians of Greater N.Y.,* 241 F. Supp. 895 (S.D. N.Y. 1965)."

It is doubtful that the District Court would have arrived at the same result had it explored the question from the standpoint of a demand for *compensatory* damages. For in such an examination, it would have been compelled to note:

(a) that, as the Court had already found as fact,[17] there was *no evidence* disclosed by the union's Trial Committee to support a finding that Cole had committed any offense embraced within the charges against him (Compare: *Boilermakers v. Hardeman,* 401 U.S. 233, 246 (1971); and

(b) that, in view of the law of New York State and under the LMRDA at the time and since, the union's officers either knew or should have known that they had no lawful right to expel a member for introducing a resolution at a union meeting.

It is suggested, therefore, that these considerations would negate the suggestion that the union's officers were free from malice in expelling Cole—in the event that such a suggestion were deemed relevant to the issue of a fee award.

But a closer look at the considerations which underlie a counsel fee award in this type of case (dealt with under

[17] The Court's formal finding No. 23(i) (at C 35a) is as follows:

"(i) The Committee's recommendation disclosed no evidence upon which a finding of malicious vilification could be sustained.

"The Committee disclosed no evidence to support a finding that the plaintiff's conduct at the meeting of August 6, 1962 was violative of Article XVI, Section 2, Paragraph (h) of the Constitution."

Point I, *supra*) will demonstrate that the question of malice or non-malice on the part of a union's officers has no bearing whatever on the fee award question—any more than the question of malice or non-malice on the part of the officers of the Electric Auto-Lite Company would have had in the *Mills* case, or on the part of the Ticonic National Bank would have had in the *Sprague* case, both *supra*.

The purpose of a fee award is not punitive; it is simply (in cases of this nature) to spread the costs of the litigation among the persons who have benefited from the litigation—namely, the members of the defendant union (in this case) or the shareholders of the defendant corporation (in the *Mills* case) or the other trust-beneficiaries who had claims against the proceeds of the bonds held by defendant banks (in the *Sprague* case). In each instance, there was (or is) a common fund in which every member of the benefited class has a material interest, such that an award against that common fund will operate to spread the costs of the litigation among the members of the benefited class.

Or to put it more simply: as regards the spreading of the costs of litigation by means of a fee award, the defendant (petitioner) union is a mere conduit between the plaintiff, John Cole, and his fellow-members. Of what relevance is it that the officers of the conduit were or were not actuated by malice?

C. The Belief of the Union's Officers as to Their Right To Expel Cole.

The findings mentioned above, concerning the "good faith" beliefs of the defendants, officers of this union, that they could expel Cole for having introduced a

resolution critical of them at a union meeting, have an importance in this case that the petitioner-union fails to note. They indicate the almost last-ditch intransigence with which the entrenched officials of this union have resisted the knowledge that they must respect the democratic rights of union members, such as Cole. For, truly, it is astounding that in the Fall of 1962—more than three years *after* enactment of the LMRDA and more than four years *after* the decision of the Court of Appeals of New York in *Madden v. Atkins,* 4 N.Y.2d 283 (1958),—the officers of this union should still be in a position to assert that they believed "in good faith" that they had the lawful right to expel a member for introducing a resolution at a union meeting critical of them!

It is often difficult, and most unpleasant, to accept the truth—especially a particular truth that threatens one's dominion over other people. The officers of this union found it most unpleasant to accept the truth that, under the LMRDA's "Bill of Rights of Members of Labor Organizations," union members have democratic rights and union officers are bound to respect those rights. Acceptance of that truth threatened—perhaps it still threatens—the authoriarian control which the officers of this union exercise over the union, and over the members of the union.

The officers of this union much preferred to believe that the "rank and file" have no rights that they are bound to respect. So the officers of this union clung to that belief. Even after LMRDA, even after *Madden v. Atkins, supra.* They clung to it so fiercely that a district court was enabled to rule that they actually believed it *in good faith.* It required this lawsuit to force them to

relinquish their belief—and to accept the truth that union members are free to express *any* views, arguments and opinions without fear of expulsion or other reprisal by the union's officers. And no argument is necessary to show that, by forcing the union's officers to accept this truth, this lawsuit has conferred substantial benefit upon every member of the union, and has rendered a valuable service to the union itself.

The value of the service rendered by this lawsuit may be shown by the intransigence, or obstinacy, with which the union's officers resisted the truth about union members' rights prior to the bringing of the lawsuit.

In particular:

1. In 1953, in a lawsuit involving the Pacific Coast District of the Seafarers' International Union of North America (the International of which petitioner union is the Atlantic, Gulf and Lakes district-affiliate, and of which Paul Hall is International President), the Supreme Court of Washington declared that the union and its officers could not lawfully expel a member because of his sharp criticism of the union's officers at a union meeting; *Mahoney v. Sailors' Union*, 43 Wn.2d 874, 264 P.2d 1095; modif. 45 Wn.2d 453, 275 P.2d 440 (1954); cert. den. 349 U.S. 915 (1955). In the *Mahoney* case, the union member had been expelled for accusing the union's officers, at a union membership meeting, of sending members through a sister union's picket lines. The Supreme Court of Washington declared the explusion unlawful and invalid, saying (43 Wn.2d at 879, 264 P.2d at 1097):

> "Whether it be said that he asked a question or made a statement, he did so in the union meeting. He spoke there upon union policies, as a member of the union, to the other

members present. This he should be able to do freely, without fear of expulsion."

The Petitioner-union hires able and experienced counsel; there can be little doubt that its able counsel advised the union's officers of the *Mahoney* decision, especially since that decision involved the union's own West Coast affiliate. Counsel undoubtedly explained the meaning of the decision to the union's officers, and advised them that union members were protected in their rights of free speech. Yet the union's officers refused to learn; as the facts of this case show, they refused to recognize the democratic rights of ordinary members. And, according to the finding quoted above, nine years after the *Mahoney* decision, they still believed that they could expel a member for an exercise of free speech identical to the one at issue in the *Mahoney* case.

2. In May 1958, the Court of Appeals of New York (the State's highest court) decided the case of *Madden v. Atkins, supra,* 4 N.Y.2d 283, 151 N.E.2d 73, involving petitioner-union's sister maritime union, the International Organization of Masters, Mates and Pilots, AFL-CIO. In that case, the sister union had expelled several members, defeated candidates for union office, for publishing "smear sheets" attacking the union's officers. The Court noted that the "smear sheets" were "ardent and hard-hitting campaign literature" and went on to say (4 N.Y.2d at 293; 151 N.E.2d at 78):

> "If there be any public policy touching the government of labor unions, and there can be no doubt that there is, it is that traditionally democratic means of improving their union may be freely availed of by members without fear of harm or penalty. And this necessarily includes the right to criticize current union

> leadership and, within the union, to oppose such leadership and its policies. (See *Polin v. Kaplan*, 257 N.Y. 277, 284, *supra*.) The price of free expression and of political opposition within a union cannot be the risk of expulsion or other disciplinary action. In the final analysis, a labor union profits, as does any democratic body, more by permitting free expression and free political opposition than it may ever lose from any disunity that it may thus evidence."

The *Madden* case established the law and public policy of New York. Surely the union's able counsel advised the union's officers of its meaning. Yet the union's officers refused to learn.

3. In September 1959, the Labor-Management Reporting and Disclosure Act of 1959 became law, guaranteeing to every union member the right (Section 101(a)(2) of the Act, 29 U.S.C. 411(a)(2)),

> "... to express any views, arguments or opinions; and to express at meetings of the labor organization his views upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings";

and further providing (Section 609 of the Act, 29 U.S.C. 529) that it shall be unlawful for any labor organization or any officer thereof to fine, suspend, expel or otherwise discipline any member for exercise of any such right. Surely able counsel explained to the officers of the petitioner-union the meaning of these provisions of the LMRDA. Yet the officers refused to learn.

4. In April 1963, while Cole was still exhausting his intra-union appeals, the Court of Appeals for the Second Circuit handed down its decision in *Salz-*

handler v. Caputo, 316 F.2d 445; and later that year certiorari was denied by this Court, 375 U.S. 946. The *Salzhandler* decision established that a union member could not lawfully be disciplined by a union for publishing a leaflet attacking the union's officers, not even where the leaflet contained libelous accusations.

Surely able counsel advised the officers of this union of the *Salzhandler* decision and explained its meaning to them. Yet they refused to learn. The union's officers not only turned down Cole's intra-union appeals; they also refused to restore him to membership until the District Court ordered them to do so in May 1964.

It is obvious, from the obstinacy with which the union's officers resisted the knowledge that they could not lawfully expel a member for his criticism of themselves, that nothing short of this lawsuit could ever have taught them that they must respect the democratic rights of union members. For if able counsel could not teach them, who or what could? If it were not for this lawsuit, in other words, the union's officers would *still*, to this day, "in good faith, believe that they ha[ve] a right to charge and discipline [a member] for his actions at ... [a membership meeting]" in introducing a resolution critical of them and/or of their policies and practices (C,19a).

Thanks to this lawsuit, the union's officers have been compelled to learn, and to recognize, that union members have democratic rights, and that among these rights is the right to speak, to introduce resolutions, etc., critical of the union's officers and their policies. The obstinacy with which the union's officers resisted that knowledge prior to the final decision of the District Court in this lawsuit indicates how necessary this lawsuit was, and how beneficial it has been to the union's members.

D. Cole's "Political Ambitions."

As noted earlier, John Cole's good faith in this proceeding and in his exhaustion of remedies prior to instituting it has not genuinely been questioned—and is beyond question. Similarly, no genuine challenge has been made, or could be made, to his good faith in any other connection. The District Court correctly regarded his good faith as being sufficiently beyond question as to render any finding by the Court pertaining to it unnecessary. And there is no evidence in the record to cast any doubt upon it.

But the union, using the rhetoric of good faith/bad faith, accuses Cole of having been guided, in matters preceding his explusion, by "personal political ambitions." What the union means is that at various times, Cole aspired to office in the union. The implication is that there is something unworthy about a union member aspiring to office in his union. Although such a suggestion can hardly stand scrutiny, it is typical of such entrenched bureaucrats as the officers of this union.[18]

There is no evidence in the record to suggest that Cole, in introducing his resolution at the membership meeting of August 6, 1962, was motivated to any degree by

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[18] Senator McClellan, in describing to the Senate the various "offenses" for which, under then-existing union constitutions, a member could be expelled from his union, came upon one offense defined as "applying for the position of another union man in office." He commented (II Legislative History of the LMRDA, p. 1104):

> "A member had better not do that. The officers have squatters' rights. Members had better not offer any competition. They had better not seek election. They had better not aspire to the presidency or the secretaryship, or they will be expelled or disciplined."

ambition or aspiration for union office. He testified at length as to his actual motivations, and his testimony is undisputed (*cf.*: Appendix in the Court of Appeals, 115a, 131a, 164a). Those motivations are the same as the purposes of the resolution as revealed by its text: Cole wanted to regularize the union's rotary hiring process so that members (including himself) would be shipped in proper order; and he wanted to end the ruinous, self-defeating policy of "raiding" sister unions, and the "dog-eat-dog warfare" that it engendered (C 30a-32a).

The truth of what Cole said in his resolution is likewise undisputed. He testified at length as to the events described in the eighth and ninth "Whereas" clauses of his resolution; his testimony is undisputed (the union neither challenged him on the facts nor introduced any evidence of its own), and it establishes the facts set forth in those clauses. *Cf.*: as regards the eighth "Whereas" clause, Appendix in the Court of Appeals, 121a-123a, 127a, 170a-173a, 128a, 183a, and the Court's finding No. 13 (C 27a); as regards the ninth "Whereas" clause, Appendix in the Court of Appeals, 44a-45a, 164a-165a, 98a-106a. The expert witness called by the union conceded his knowledge of some of these facts and, moreover, conceded that the practices described and criticized by Cole would be a "very bad policy" and "self-defeating" for the union (Appendix in the Court of Appeals, 184a). And *cf.*: *Cole v. Hall*, 56 LRRM 5606 (E.D. N.Y. 1964).

Political motivation did not, according to the evidence, enter into Cole's reasons for introducing the resolution for which he was subsequently expelled. However Cole did, at various times, aspire to union office. This is shown by various handwritten personal letters that he wrote at various times in the course of the 1950s to various

officers and representatives of the union, some of them containing "complaints, grievances and accusations."[19] The letters, of course, were not a basis for Cole's expulsion and are therefore irrelevant to this case, even though the District Court allowed the union (over plaintiff's opposition) to admit them into evidence. Nevertheless, the letters indicate that on August 24, 1954, Cole offered to run for union office on the incumbent's slate (C 11a); they also indicate that during the 1950s Cole became disenchanted with the union's current leadership and its policies, in particular with its practice of signing "sweetheart" contracts. In 1960, Cole actually did run for the office of Headquarters' Rep-representative, but in opposition to the three incumbents holding that post (Trial Transcript pp. 780-781).[20]

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[19] The union bases its argument about "political ambition" upon a finding by the District Court that the "complaints, grievances and accusations were, in part, motivated by the plaintiff's political ambitions for union office." (C 38a). It is not clear whether the District Court intended this finding to refer only to the handwritten letters, all of which were written long before the membership meeting of August 6, 1962 (and which therefore have nothing even remotely to do with this case), or whether it intended the finding to refer as well to the resolution. As noted earlier, however, there is no evidence in the record to suggest the applicability of such a finding to Cole's introduction of the resolution.

[20] The District Court's Opinion, commenting upon the 1954 letter, says that "the plaintiff, at a later date, decided to challenge the defendant, Paul Hall, for office" and that "thereafter" Cole criticized the union and its officers for mishandling money. The evidence reveals that Cole did not run against Paul Hall for office until 1964, after he had been expelled from the union and reinstated as a result of the preliminary injunction issued by the District Court (Trial Transcript, pp. 782-784).

In other words, although the evidence indicates that Cole was not motivated, not even in part, by ambition for union office in introducing his resolution, nevertheless it might easily have happened that he introduced such a resolution as a result of such motivation. We may, therefore, accept *arguendo* the union's assertion that he was so motivated. Plainly, in that event, his case would be in all important respects identical with *Gartner v. Soloner, supra,* 384 F.2d 348 (3rd Cir. 1967, cert. den. 390 U.S. 1040. There, the union member, a candidate for union office and leader of a minority faction within the union, led a group of members in picketing the union's offices four days before the election. They carried picket signs with the legend, "Brennan and Soloner Dictators of Philadelphia." Brennan and Soloner were the union's top officers. After being defeated for office, the union member filed election appeals in which he accused the union's officers of illegally depriving union members of their rights to vote. He was charged, tried and fined for the picketing and for bad faith in his appeals; for both offenses he was suspended from membership for one year. His suit was brought to invalidate the fines and the suspensions. *Cf.: Gartner v. Soloner,* 220 F. Supp. 115, 117 (E.D. Pa. 1963) (granting plaintiff's motion for preliminary injunction). Would it not remain true, as it did in *Gartner,* that the union member's lawsuit, by establishing the right of members to engage in free political campaigning for union office, vindicated Congress's policy of establishing union members' freedom of speech and thereby conferred a substantial benefit upon the union's members?

Or let us consider *Yablonski v. United Mine Workers, supra,* 466 F.2d 424 (D.C. Cir. 1972), in which *the lawsuits themselves* were motivated by the plaintiff's

political ambition for union office. Yablonski had brought four lawsuits designed to advance his candidacy in connection with the union's election. Specifically, the lawsuits sought to assure his access to the union's mailing list for the distribution of campaign literature to members; to assure proper coverage of himself in the union's journal; to win reinstatement as a member of Labor's Non-Partisan League, the union's political arm, and thereby increase the political prestige of his candidacy; and to assure adequate safeguards over the counting of ballots. The District Court had noted that the "primary purpose" of all four lawsuits was to advance Yablonski's candidacy—i.e., his "political ambitions"—for the union's presidency. The Court of Appeals commented that

> "... it is obvious that in virtually all litigation of this character, in the labor field or out, a plaintiff pursues his own interest as well as that of others. The relevant question is whether or not the trouble he takes results in the actual conferring of benefits on others than himself."
>
> (*Yablonski v. United Mine Workers, supra*, 466 F.2d at 430.)

Approaching the matter of this light, the Court concluded that the institution of the lawsuits was significantly beneficial to the union and its members, not only in the immediate impact of the results achieved "but in their implications for the future conduct of the union's affairs" (*Ibid.*, 466 F.2d at 431).[21]

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[21] The Court went on to comment:

"Surely few would claim that the results of these litigations have not made the UMW a more democratic union or membership in it a more valuable and dignified status. Certainly no member of Congress who voted for LMRDA would fail to recognize that in this instance the Act worked

Unlike the *Yablonski* case, the present suit was not motivated by "political ambitions." But there can be little doubt that its result, like those of the four *Yablonski* suits, has proved to be significantly beneficial to the union and its members, by its implications for the future conduct of the union's affairs. The union's officers have, at last, been compelled to recognize the democratic rights of the union's members. The union's members now know that they have democratic rights and—perhaps an even more valuable bit of knowledge—that they can secure protection for those rights, and protection against any reprisal for their free exercise of those rights. There can be little doubt that the same considerations that led the courts in *Gartner* and *Yablonski* to make fee awards that would operate so as to spread the costs of the litigation among the members of the union are applicable here. A union member whose lawsuit has conferred such valuable and substantial benefit upon the union and upon all its members should not be made to bear, alone, the full cost of the litigation.

CONCLUSION

The decision of the Court of Appeals for the Second Circuit should be affirmed.

Respectfully submitted,

BURTON H. HALL

Attorney for Respondent

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just the way it was intended to work, i.e., advancing union democracy by opening up the courts to one directly aggrieved member for the benefit of all." (*Ibid.*, 466 F.2d at 431).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-630

PAUL HALL, individually and as President or AL KERR, as Secretary Treasurer, or EARL SHEPARD, as Vice President, or CAL TANNER, as Executive Vice President of the Seafarers International Union of North America—Atlantic, Gulf, Lakes and Inland Waters District,

Petitioners,

—v.—

JOHN COLE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-630

PAUL HALL, individually and as President or AL KERR, as Secretary Treasurer, or EARL SHEPARD, as Vice President, or CAL TANNER, as Executive Vice President of the Seafarers International Union of North America—Atlantic, Gulf, Lakes and Inland Waters District,

Petitioners,

—v.—

JOHN COLE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

Interest of Amicus

The American Civil Liberties Union is a nation-wide non-partisan organization with 180,000 members in the United States. It is engaged solely in the defense of those principles embodied in the Bill of Rights. During its fifty year existence the ACLU has been concerned with the special responsibility labor unions have to maintain democratic standards. In a membership organization, freedom of speech and the right to criticize is of prime importance for

the democratic conduct and control of the group. Hence, ACLU is especially concerned that the Bill of Rights provisions of the Labor-Management Reporting and Disclosure Act of 1959, Title I, §§101-105, are interpreted and administered in such a way as to best assure the protection of these rights.

This case raises the important question whether union members are entitled to receive attorneys' fees in actions brought under §102 of the Act. The issues in this case go well beyond the interests of the parties directly involved in it. In the attached brief, therefore, *amicus curiae* presents argument to place the case in broader context, as well as argument directed towards this case.

Statement of the Case

At a regular meeting of the membership of Petitioner's Union on August 6, 1962, John Cole, respondent, attempted to present a set of preambles and proposed resolutions concerning the shipping rules of the Union to the membership. Cole was at first ruled out of order and the meeting continued with other business. Later, Cole was allowed to present the proposals. However, he was not permitted to present them himself; instead they were read by the reading clerk. Thereupon Hall opposed the proposals and characterizing Cole as an ingrate declared that "the plaintiff had violated the Union rules in the past and that the plaintiff should have been charged with violations a long time ago." Immediately thereafter, there being no debate, a vote was taken and Cole's resolutions were overwhelmingly defeated.

On September 4, 1962, a "charge sheet" was filed against Cole alleging that he had violated a provision of the Union Constitution at the August 6 meeting, by maliciously vilifying the officers and the Union. At a meeting on that date the charges were presented to the members and were accepted by a majority vote. Cole was duly notified to appear before a union "Trial Committee" on October 9, 1962, which was to be elected at a special membership meeting held on that date. All members elected to the Trial Committee had voted to accept the charges levied against John Cole on September 4.

The Committee met with the Union Vice President present. Cole, while permitted to present a written defense to the charges. The Committee disclosed no evidence to support its findings of guilt.

Cole then exhausted his intra-union remedies to no avail. He brought suit on December 10, 1963, and six months later, on May 27, 1964, was restored to membership by a temporary injunction. Seven years later the case went to trial and resulted in a permanent injunction restoring Cole to membership rights and awarding him attorney's fees. *Cole* v. *Hall,* 66 L.C. ¶11,953. One year later the decision was affirmed by the Second Circuit. *Hall* v. *Cole,* 462 F.2d 777.

Summary of Argument

Federal Courts have historically exercised the power of awarding counsel fees as a part of the original authority of the chancellor to do equity in a particular situation. That power has been exercised in three situations: first, where the other party's action is vexatious, oppressive or

in bad faith; second, where a plaintiff's representative action creates a common fund for the benefit of the members of the class; and third, where the plaintiff's suit indicates an important statutory policy which relies for its enforcement on private suits, and the suit renders substantial benefits to others as well as the plaintiff. The third category of cases requires no showing of bad faith on the part of the defendant nor the creation of a common fund. Counsel fees are awarded because of the plaintiff's contribution to the enforcement of Congressional policy and to the protection of rights other than his own.

The situation presented here falls squarely into the third category of cases in which courts have traditionally awarded counsel fees. Congress, in enacting the Bill of Rights for Members of Labor Organizations, sought to protect the democratic process in unions and to strengthen union self-government as a necessary corollary to the union's statutory right of exclusive representation. Basic individual rights were guaranteed in order to give union members the tools to combat racketeering, corruption and abuse of power. Congress, in choosing the means of protecting these basic rights and enforcing its policies, relied solely upon suits brought by individual union members.

Successful suits for violation of these rights not only effectuate congressional policy, they confer substantial benefits on the union as an institution and on all of its members. Therefore the cost of achieving these rights should be borne by the union and its members who are the beneficiaries. The plaintiff, by vindicating his right to present a resolution on union policy at a union meeting, opens this forum for debate. The union is benefited by making its decisions more responsible and responsive. The

plaintiff, by vindicating his right to criticize union officers, vindicates the right of all members to speak out. The union's process of self-government is strengthened, and the freedoms of all members are articulated and protected.

Awarding of counsel fees is necessary if congressional policy is to be effectuated. Plaintiffs seldom have the resources to carry through expensive and protracted litigation against defendants whose counsel fees are paid from the union treasury. The plaintiff may recover no damages because the rights violated are political rights incapable of monetary evaluation. Denial of counsel fees to prospective plaintiffs will discourage or bar most union members from fulfilling the responsibility placed upon them by Congress of enforcing basic democratic rights in their union. Payment of counsel fees from the union treasury places the burden where it belongs—on the union whose democratic processes have been strengthened and vitalized, and all of its members who have shared in increased recognition of their rights.

Nothing in the wording of the Act or its legislative history shows that Congress intended to curtail the historical power of the courts to award counsel fees in appropriate situations. The words of Section 102 are all inclusive—"such relief (including injunctions) as may be appropriate." None of the drafters of Title I or its supporters even suggested that courts should have available less than the full panoply of equitable remedies. On the contrary, the whole thrust of the legislative history of Title I demonstrates a dominant concern that the remedies available under Section 102 be fully effective. Indeed, those members of the House who articulated most forcefully the importance of awarding counsel fees included this as one of the reasons for

supporting the Landrum-Griffin bill. Section 102 of that bill contains the very words now in the Act.

In the absence of express intent on the part of Congress to limit the historic power of equity courts to act according to the necessities of the case, the courts retain the power to award counsel fees in appropriate cases for violation of Title I. In a case such as the present one, awarding counsel fees is essential if the rights guaranteed by Title I are to be made real and if the policies of Congress are to be enforced. The burden of vindicating those rights should be taken from the backs of the victim and be shouldered by the union and its members who are the beneficiaries.

ARGUMENT

I.

A Union member whose suit under Title I protects the democratic processes of the Union and secures basic rights for other members of the Union may be awarded counsel fees.

A. *General Principles Guiding Award of Counsel Fees*

The traditional American rule, in contrast with the rule in most other countries, is that counsel fees are not ordinarily awarded to successful litigants. Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society*, 54 Cal. L. Rev. 792 (1966). The traditional rule, however, has never been rigidly applied, for both the courts and Congress have developed exceptions to this rule "for situations in which overriding considerations indicate the need for such a recovery." *Mills* v. *Electric Auto-Lite Company*, 396 U.S. 375, 391 (1970).

The courts, in developing exceptions to the traditional rule, have acted upon "the general authority of the chancellor to do equity in a particular situation," *Sprague* v. *Ticonic Nat. Bank*, 307 U.S. 161, 166 (1939). Those exceptions have fallen generally into three broad categories. First, counsel fees may be awarded where the other party's action is vexatious, oppressive or in bad faith. 6 Moore, *Federal Practice*, Para. 54.77(2) (2d ed. 1971); *Bell* v. *School Board of Powhatan County*, 321 F.2d 494 (4th Cir. 1963); *Rolax* v. *Atlantic Coast Line R.R.*, 186 F.2d 473 (4th Cir. 1950). In this exception, the underlying rationale is one of punishment and the essential element is willfulness or bad faith. Second, counsel fees have been awarded where a plaintiff's representative action creates a common fund, the economic benefit of which is shared by all members of a class. *Sprague* v. *Ticonic Nat. Bank, supra;* Hornstein, *The Counsel Fee in Stockholder's Derivative Suits*, 39 Col. L. Rev. 784 (1939). The rationale here is that failure to award counsel fees, "not only would be unjust to [the plaintiff] but it would give to the other parties entitled to participate in the benefits of the fund an unfair advantage." *Trustees* v. *Greenough*, 105 U.S. 527, 532 (1882). Third, counsel fees have been awarded when the plaintiff by his suit has enforced a statutory policy and has benefited a group of others in the same manner as himself. Hornstein, *The "Salvage" Factor in Counsel Fee Awards*, 69 Harv. L. Rev. 658 (1956).

It is the third category of cases with which we are here principally concerned. The leading case is *Mills* v. *Electric Auto-Lite Company*, 396 U.S. 375 (1970). In this case, a group of stockholders brought suit to set aside a merger which had been accomplished by a misleading proxy state-

ment. There was no common fund created, and no determination was made that the terms of the merger had been unfair, but the Court awarded counsel fees to be paid out of the corporate treasury. The rationale was expressed in these terms:

> [T]he stress placed by Congress on the importance of fair and informed corporate suffrage leads to the conclusion that, in vindicating the statutory policy, petitioners have rendered a substantial service to the corporation and its shareholders . . . [P]rivate stockholders' actions of this sort 'involve corporate therapeutics,' and furnish a benefit to all stockholders by providing an important means of enforcement of the proxy statute. 396 U.S. at 396.

In awarding counsel fees, the Court in *Mills* articulated two basic elements: First, the plaintiff's suit vindicated an important statutory policy—here, the policy of "a fair and informed corporate suffrage." Second, by vindicating that policy, the plaintiff benefited other members of the group the same as himself—here, the benefit of other stockholders in being able to exercise an informed suffrage. The plaintiff is awarded counsel fees because, in bringing his suit, "he does so not for himself alone but as a 'private attorney general,' indicating a policy that Congress considered of highest priority." *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968).

In *Piggie Park, supra,* the Court emphasized a third factor which reinforced the successful plaintiff's right to counsel fees—the limited resources of the "private attorney general" to prosecute the violations. With reference to

suits brought to enforce Title II of the Civil Rights Act of 1964, the Court stated:

> If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts. 390 U.S. at 402.

The federal courts, in awarding counsel fees in this category of cases where there may be no bad faith or common fund, have not always required or relied upon the presence of all three elements. In some "private attorney general" cases, the courts have emphasized that function of the private suit in enforcing statutory policy, and the need to award counsel fees to make that enforcement effective. Thus, in *Lee* v. *Southern Home Sites Corp.*, 444 F.2d 143 (5th Cir. 1971), the Court of Appeals of the Fifth Circuit awarded counsel fees to a plaintiff who prevailed in a suit against a real estate developer for refusal to sell lots to Negroes in violation of 42 U.S.C. Sec. 1982, on the following rationale:

> The statute under its present judicial development, depends entirely on private enforcement. Although damages may be available, . . . in many cases there may be no damages or damages difficult to prove. To insure that private litigants are willing to act as 'private attorneys general' to effectuate the public purposes of the statute, attorneys' fees should be as available as under 42 U.S.C. Sec. 3612(c). 444 F.2d at 147-8.

In a similar suit for discriminatory refusal to rent an apartment, the Court of Appeals of the First Circuit, in

awarding counsel fees, observed that violation of an important public policy may involve little by way of damages in comparison with the costs of vindication. In such cases an award of costs "will remove the burden from the shoulders of the plaintiff seeking to vindicate the public right," *Knight* v. *Auciello*, 453 F.2d 852, 853 (1st Cir. 1972).

In other cases, the courts have emphasized the benefits rendered to the class represented. Thus, in *Sims* v. *Amos*, 340 F. Supp. 691 (M.D. Ala. 1972), the court awarded counsel fees to plaintiffs who had successfully sued to compel reapportionment of the Alabama legislature. The class benefited consisted of all voters of the state, and the benefit was protection of the basic right to free and equal suffrage. And in *NAACP* v. *Allen*, 340 F. Supp. 703 (M.D. Ala. 1972), the Court awarded the NAACP counsel fees for successfully prosecuting an action under 42 U.S.C. Sec. 1483 to prohibit continued discrimination in hiring by the state police. The benefit was to Negroes in providing them added employment opportunities.

What has emerged from the *Mills* and *Piggie Park* decisions is a broad category of cases in which the courts, exercising their traditional equitable authority, have awarded counsel fees to successful plaintiffs even though there has been no showing of bad faith on the part of the defendant and the suit has not resulted in a common fund. That category is generally circumscribed by three basic elements. First, the plaintiff's suit vindicates an important statutory policy which relies for its enforcement on private suits. Second, the suit renders substantial benefits to others as well as the plaintiff, benefits which may be as broadly spread as to all other stockholders, all other Negroes, or all voters, and benefits which may be as incapable of valua-

tion as the equal right to rent an apartment, the equal right to state employment, and the right to fair and equal suffrage. Third, the limited damages which can be claimed by the plaintiff in comparison with the costs of prosecuting the action require the awarding of litigation costs if the statutory policy is to be effectively enforced and the benefits are to be rendered to others. Note, *Allocation of Attorney's Fees After Mills v. Electric Auto-Lite,* 38 U. Chi. L. Rev. 316 (1971); Note, *Allowance of Attorney Fees in Civil Rights Litigation Where the Action Is Not Based on a Statute Providing for an Award of Attorney Fees,* 41 U. Cin. L. Rev. 405 (1972).

We turn now to a consideration of how these basic elements apply to suits brought under Title I of the Labor-Management Reporting and Disclosure Act generally, and to this case in particular.

B. *The Statutory Policy Enforced by Private Suits Under Title I*

Title I—the Bill of Rights of Members of Labor Organizations, articulates and implements the central policy of the statute—protection of the democratic process in unions. Although Title I creates privately enforceable rights, the concern reaches far beyond the individual whose rights have been violated. Individual rights were protected to increase the responsibility of union self-government, for responsible self-government was preferred to government control of union policies. Senator McClellan, in introducing the Bill of Rights, stated his belief that "racketeering, corruption, abuse of power and other improper practices" would never be prevented until Congress prescribed "minimum standards of democratic process." "Without such pro-

tection," he declared, "other provisions of law may be of little benefit and meaningless," **II Legislative History of the Labor-Management Reporting and Disclosure Act of 1959**, p. 1098 [hereinafter cited as Leg. Hist.]. During the course of the debate, he summarized the basic policy underlying Title I:

> If we want fewer laws—and want to need fewer laws—providing regulation in this field, we should start with basic things. We should give to union members their inherent constitutional rights, and we should make those rights apply to union membership as well as to other affairs of life. We should protect the union members in those rights. By so doing we will be giving them the tools they can use themselves. II Leg. Hist. 1103.

The public interest in protection of these rights was underlined by making any willful interference with these rights by a union officer or agent a criminal offense (Section 102), and by providing that civil enforcement should be by suits brought by the Secretary of Labor "for such relief as may be appropriate, including, but without limitation, injunctions to restrain any such violations and compel compliance with this title." II Leg. Hist. 1102. Protection of these rights was not to rest solely on the interest and ability of the aggrieved member, for these were public rights to be publicly protected.

Criticism of these enforcement provisions did not challenge the basic proposition that effective enforcement of the Bill of Rights would implement the policy of Congress to protect democratic processes in unions and thereby make union self-government more responsible. Criticism

was directed almost entirely to three points. First, enforcement of these rights through injunction suits by the Secretary was nearly identical to enforcement provisions in civil rights legislation which a number of Senators had adamantly opposed the year before. II Leg. Hist. 1110, 1111, 1112, 1113. Second, fear was expressed that the Secretary would be overwhelmed by the burden of initiating suits "on behalf of 15 million Americans." II Leg. Hist. 1113, 1114, 1117. Third, the criminal provision was criticized as being too vague, making union officers vulnerable to felony prosecutions for minor and borderline violations. II Leg. Hist. 1117. Despite these criticisms, the Bill of Rights passed the Senate with these enforcement provisions unchanged. II Leg. Hist. 1119.

Two days later, Senator Kuchel introduced a redrafted version of the Bill of Rights on behalf of himself and eight other senators, six of whom had voted against the earlier version. The revised Bill of Rights eliminated suits by the Secretary, and substituted in Section 102, suits by the union member.

> Sec. 102. Any person whose rights secured by the provisions of this title have been infringed may bring an action in a district court of the United States for such relief as may be appropriate.

The only explanation of this change was that "giving this type of right to the aggrieved employee member himself was in the interest of justice," and there was no suggestion that protection of these rights was of any less public concern or any less important to the implementation of Congressional policy. On the contrary, Senator Kuchel went to special pains to make clear that criminal penalties for

violations of these rights still remained. II Leg. Hist. 1232. He reassured his colleagues that the Attorney General stood behind the guarantee of these rights.

The Landrum-Griffin bill, H.R. 8400, eliminated the Senate provision for criminal enforcement of Title I, and substituted Section 609, as presently worded. I Leg. Hist. 676. Representative Griffin explained that this change had been made because "the conduct prohibited by this section is generally comparable to conduct described as an unfair labor practice under the Taft-Hartley Act and, accordingly, we do not believe that criminal sanctions are warranted." The rights protected were still viewed as publicly protected rights, like those protected by the Taft-Hartley Act, but the appropriate sanctions were civil remedies, not criminal prosecution. Enforcement was to be through suits brought by individual members instead of through complaints prosecuted by the General Counsel of the National Labor Relations Board.

Permeating the whole legislative history of Title I was the Congressional purpose to protect basic democratic rights guaranteed by Title I as an essential part of strengthening the democratic process in unions. Protection of these rights was of public concern, because free exercise of these rights was in the public interest. Responsibility for enforcement of these rights was first placed in the Secretary of Labor and the Attorney General, but reliance ultimately was placed on suits by individual union members. The rights were no less infused with public concern, for effective enforcement of these guarantees was essential to effectuate Congressional policy. Individual union members were to serve as substitutes for the Secretary of

Labor, the Attorney General or the General Counsel of the NLRB. When an individual member brings a suit, "he does not do so for himself alone, but also as a 'private attorney general' vindicating a policy of highest priority." *Newman* v. *Piggie Park*, 390 U.S. 400, 402 (1967).

The rights protected by the plaintiff's suit in this case are ones which are most central to the Congressional policy of protecting democratic processes in unions. The plaintiff, who had criticized the union officers for their handling of union funds, sought to challenge the incumbent president for office (Appendix C, Petition for Cert., p. 11a). As a part of these efforts to change the policies and the leadership of the union, he introduced at a union meeting a resolution criticizing the lack of democracy in the union, discriminatory application of union rules, failure to follow the union contract, and raiding of other unions (Appendix E, pp. 28a-30a). His resolution sought changes in procedures in assigning jobs from the union's hiring halls (Appendix E, p. 32). Because he questioned the union's policy of raiding other unions, he was charged with "deliberate and malicious vilification" of the officers expelled.

The plaintiff was engaged in precisely the kind of conduct Congress sought to encourage and protect. The plaintiff sought to use the internal processes of the union to correct what he considered abuses and to change the policies of the union. For this he was expelled. The plaintiff's suit to avoid the expulsion vindicated the basic policy of Congress in protecting the right of free speech, the right to participate in union meetings, and the right to seek a change in union policies and leadership. "The pervading premise of both of these titles [Title I and IV] is that there should be full and active participation by the rank and

file in the affairs of the union." *Musicians Federation* v. *Wittstein,* 379 U.S. 171, 182-3 (1964). Only the plaintiff could vindicate the Congressional policy, and only by the suit which he successfully brought. Congress relied upon individual union members to enforce its policy, and the plaintiff has fulfilled that responsibility as a "private attorney general" successfully prosecuting this suit.

C. *The Benefit Conferred on the Union and on Other Members of the Union*

Congress clearly determined, in enacting the Labor-Management Reporting and Disclosure Act, that encouraging and protecting the democratic processes in unions would benefit the union as an institution. Sen. Rep. No. 187, 86th Cong. 1st Sess. (1959) pp. 6-7 (I Leg. Hist. 402-3) H. Rep. No. 741, 86th Cong. 1st sess. (1959) p. 6 (I Leg. Hist. 764). Protecting democratic rights would give union members the tools with which to correct abuses and conduct responsible self-government. This, in turn, would create confidence in the integrity of unions and avoid the need for further legal controls. II Leg. Hist. 5810.

The plaintiff's suit here has promoted and encouraged the democratic process in this union. It has articulated for the officers and the members that "there should be full and active participation by the rank and file in the affairs of the union." *Musicians' Federation* v. *Wittstein, supra:* that is, union members have a right to criticize their officers and question union policies; and that union meetings are to be open to discussion and debate. The suit has served as a union "therapeutic," see *Mills* v. *Electric Auto-Lite Co.,* 396 U.S. 375 (1970), to help cure the defects in the

union's democratic process. *Kerr* v. *Screen Extras Guild, Inc.*, 466 F.2d 1267 (9th Cir. 1972). This contribution to restoration of the union to democratic control entitles the plaintiff to payment of counsel fees from the union treasury, *Ratner* v. *Bakery & Confectionery Workers International Union*, 335 F.2d 691 (C.A. D.C. 1964).

The benefit rendered to other members of the union by the plaintiff's suit is manifest. No arguments or citations are needed to this Court to demonstrate the chilling effect which punishing one man for what he says has on all others who may want to speak. When the plaintiff sued to protect his rights, he dispelled the chill cast on other members' rights. In protecting his right of free speech, he gave them increased freedom to speak; in voiding his expulsion he freed them from the fear of charges. The judgment he won inured to the benefit of all his fellow members. As Mr. Justice Clark said in the decision below, "In vindicating his right, he vindicated their right." 462 F.2d at 780.

The "therapeutic" contribution of the plaintiff's suit, both to the union and to the other members, was desperately needed, for the democratic life within this union had lost vitality. The trial court found that the union officers and the members who voted to expel the plaintiff "in good faith, believed that they had a right to charge and discipline the plaintiff for his actions at the meeting of August 6, 1962" (Appendix C, p. 19a). This finding of "good faith" is a finding of near fatal illness in the democratic process in this union. It is a finding that the officers and the members present believed that a member was not entitled, in a union meeting, to question union policies or to submit resolutions for changes of union policies. It is a finding that the union officers and members present believed that

criticism of union officers for pursuing certain policies constituted "deliberate and malicious vilification" of officers. It is a finding that the Trial Committee believed that he could be expelled on these charges even though there was no evidence to support the charges placed against him (Appendix E, p. 35a). Within this union, the prevailing conception of the democratic process was one which did not recognize the most basic rights guaranteed by Congress. The plaintiff's suit helped make clear in concrete terms, to the officers and the members, the kind of process Congress intended. A suit such as this was essential to dispel the prevailing misconception, within the union, inform union members of their rights, teach the union to respect those rights, and set the union on the road to recovery of its democratic vitality.

The argument that the plaintiff has gained some personal benefit from the suit need not detain us long. This has not been considered a bar to the awarding of counsel fees where the plaintiff's suit has enforced Congressional policy or benefited others. *Yablonski* v. *United Mine Workers of America,* 466 F.2d 424, 431 (C.A. D.C. 1972); *Burch* v. *International Association of Machinists,* 454 F.2d 1170 (5th Cir. 1971); *Lee* v. *Southern Home Sites Corp.,* 444 F.2d 143 (5th Cir. 1971); *Knight* v. *Auciello,* 453 F.2d 852 (1st Cir. 1972); *NAACP* v. *Allen,* 340 F. Supp. 703 (M.D. Ala. 1972). The rationale for awarding attorneys' fees is the contribution made by the plaintiff either to Congressional policy or to others. Where there is a substantial benefit to others, "To allow the others to obtain full benefit from the plaintiff's efforts without contributing equally to the litigation expenses would be to enrich others unjustly at

the plaintiff's expense." *Mills* v. *Electric Auto-Lite Co.*, 39 U.S. at 392.

Moreover, the benefits obtained by the plaintiff in this case are not significantly different from those obtained by other members. Indeed, his benefit is less. He was awarded no monetary damages, his only benefit was the voiding of his expulsion. At the end of the suit, he has nothing more than union membership with the right of free speech within the union, the same rights enjoyed by all the other members. In the meantime, he was totally excluded from the union membership for nearly two years before he exhausted his internal appeals and obtained a temporary injunction, he carried the burden of prosecuting the case for nearly nine years, and he was injured and forced to retire before his rights were vindicated. The primary beneficiaries of this long and costly suit to establish the right of free speech within the union are the union and its present members.

The plaintiff, by his suit, has plainly conferred a substantial benefit on the union as an institution, and upon all other members of the union. It would be unjust for them to enjoy the full benefits of his litigation and not bear its costs. Moreover, there is a common fund from which these costs can properly be paid—the union treasury. The union treasury is a fund made up of contributions by the members and held for the benefit of the organization and its members. Payments of the costs of a Title I suit from which the union and its members have benefited is a proper use of those funds. *Johnson* v. *Nelson,* 325 F.2d 646 (8th Cir. 1963). Indeed, it would be a perversion of justice and a flaunting of Congressional policy to permit the use of union funds to pay litigation costs incurred in resisting

recognition of the democratic rights and deny the use of those funds to reimburse the litigation costs incurred in protecting those rights on behalf of all members.

D. *The Need for Award of Counsel Fees*

The need for award of counsel fees is particularly acute in most Title I actions if Congressional policy is to be implemented or union members are to enjoy fully the rights guaranteed by the Title. The reasons for this are quite obvious.

First, the rights involved are essentially political rights—equal rights to nominate candidates, vote in elections, and participate in union meetings, Section 101(a)(1); the right of freedom of speech and assembly, Section 101(a)(2); and the right to a fair trial, Section 101(a)(5). Monetary values cannot be placed on these rights and their violation seldom entitles the aggrieved member to compensatory damages. Denial of these rights, even expulsion for their exercise, may result in no interference with the victim's employment; indeed, Section 8(a)(3) of the National Labor Relations Act prohibits any discrimination in employment because employees are "good, bad, or indifferent members." *Radio Officers* v. *Labor Board,* 347 U.S. 17, 40 (1954). Successful litigation holds out no prospect of a damage award out of which the costs of litigation and counsel fees can be paid.

Second, suits are brought by individual workers, often isolated individuals who have little or no group support. Unlike suits under Title IV-Elections, where almost by definition the plaintiff is supported by a substantial group, or suits under Title III-Trusteeships, where the plaintiff is the local union or speaks for it, in Title I suits the individual member frequently has no resources except his

meagre savings, the charity of his friends and the devotion of his lawyer.

Third, the defendants can draw upon the full resources of the union to frustrate the suit. The individual whose rights have been denied must sue the union and its officers who have recourse to the union treasury to defend the action. He cannot match these resources and the defendants can exploit every procedural device to complicate and prolong the suit and exhaust all costly and extended appeals. The plaintiff, with no hopes of recovering litigation costs, is often compelled to abandon vindication of his rights. Summers, *The Law of Union Discipline: What the Courts Do in Fact,* 70 Yale L.J. 175, 220-1 (1960).

The present case exemplifies the reasons which make award of counsel fees so necessary in many Title I actions. The union here violated the most basic rights guaranteed by the Bill of Rights. Although the plaintiff was expelled for exercising his right of free speech and barred from running for union office or attending union meetings, he recovered no damages. He was singled out and silenced, left to vindicate his rights from his meagre resources with the support of counsel, who served largely on a *pro bono publico* basis.* He was confronted with an appeal from a temporary injunction, 339 F.2d 881 (1965), multiple motions, interrogatories, an extended trial and a second appeal. The litigation lasted more than nine years, and only because of the devotion of his counsel was he able to carry the case to a successful conclusion.

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* The attorneys for *amicus curiae* confirm the finding reflected in the opinion of the Court of Appeals, that this suit was not sponsored or financed by the American Civil Liberties Union or its affiliates.

If the plaintiff in this case is not now awarded litigation costs and counsel fees, the overriding lesson for him, for his counsel and for all other union members will be to not insist on asserting the rights proclaimed by Title I and attempting to vindicate them in the courts. His rights will be nominally vindicated, but the policy of Congress will not have been enforced, and the other members of the union will receive no benefits. For all the union members will know, and their officers will know they know, that Title I is but empty words which hold a promise to the ear but break it to the heart. Mr. Justice Clark, in writing the opinion below, engaged in no hyperbole when he said, "Not to award counsel fees in cases such as this would be tantamount to repealing the Act by frustrating its basic purpose." 462 F.2d at 780.

E. *The Irrelevance of "Good Faith" Where the Suit Enforces Congressional Policy and Benefits the Union and Its Members*

The trial court refused to grant punitive damages because "the defendants, in good faith, believed that they had a right to charge and discipline the plaintiff for his actions at the meeting of August 6, 1962." This lack of showing of malice does not bar the court from exercising "the general authority of the chancellor to do equity in a particular situation." *Sprague* v. *Ticonic Nat. Bank*, 307 U.S. 161, 166 (1939).

Where the underlying rationale for awarding counsel fees is one of punishing the defendant for its "unreasonable, obdurate obstinacy," *Bradley* v. *School Board of City of Richmond, Virginia*, 345 F.2d 310, 321 (4th Cir. 1965), then a finding that the defendant has acted in good

faith saves it from a punitive award of counsel fees. *Brewer* v. *School Board of The City of Norfolk, Virginia*, 456 F.2d 943 (4th Cir. 1972). This, however, is a different category of cases than the one now before the Court.

The rationale for awarding counsel fees here is that the plaintiff, by his successful suit, has enforced Congressional policy, and has conferred a substantial benefit on the union and its members. When Congress has relied upon private suits to enforce its policy, then counsel fees are awarded because of the service the plaintiff has performed and the necessity of awarding counsel fees to enable him to perform that service. The good faith of the defendant does not deprive the plaintiff of his right to counsel fees. *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968); *Lee* v. *Southern Home Sites Corp.*, 444 F.2d 143 (5th Cir. 1971); *NAACP* v. *Allen*, 340 F. Supp. 703 (M.D. Ala. 1972). When substantial benefits are conferred on defendants, simple justice requires the defendants help bear the burden. The defendants' good faith does not entitle them to unjust enrichment. *Mills* v. *Electric Auto-Lite*, 396 U.S. 375 (1970).

In *Mills, supra,* there was no showing that the directors, in sending out the misleading proxy statement, acted in bad faith, or that it worked any unfairness on minority stockholders. But the plaintiffs were allowed to recover counsel fees out of the corporate treasury. This was "not to saddle the unsuccessful party with the expenses but to impose them on the class benefited." 396 U.S. at 396-7. So here, the union officers and other members may have believed in good faith that they had a right to discipline the plaintiff, and they may have believed it was in the best interests of the union, but plaintiff's suit has encouraged and protected the democratic process in the union and has

protected the rights of every member. The union and its members have reaped the benefits of his suit, regardless of their initial good faith, and should pay for those benefits out of the union treasury. Indeed, the finding of initial good faith in believing that a member could properly be expelled for criticizing union officers and questioning union policy underlines the importance of the benefit which the plaintiff has conferred in encouraging and protecting the democratic process within this union.

Even if good faith were a defense to claims for counsel fees, the finding here would not bar recovery. The finding here is only that there was good faith in bringing charges and expelling the plaintiff from the union in October, 1962. At this time, there may have been some reason for believing that the right of free speech under Title I did not protect such vigorous criticism and advocacy. However, in April, 1963, the Court of Appeals of the Second Circuit explicitly held in a widely publicized decision that unions could not expel members for slandering union officers by accusing them of mishandling union affairs. *Salzhandler* v. *Caputo*, 316 F.2d 445. Subsequent to this decision, the defendants resisted the plaintiff's suit, and appealed from a temporary injunction ordering him reinstated. The temporary injunction was affirmed on the authority of *Salzhandler* v. *Caputo*, with the Court of Appeals making unmistakably plain that the plaintiff could not be expelled for the conduct with which he was charged. *Cole* v. *Hall*, 339 F.2d 881 (2d Cir. 1965).

Despite this ruling by the Court of Appeals, and in the face of accumulating precedents in the Second Circuit giving broad scope to the right of free speech, *Farowitz* v.

Associated Musicians, 330 F.2d 999 (2d Cir. 1964); *Giordani* v. *Upholsterers International Union,* 403 F.2d 85 (2d Cir. 1968), the defendants stubbornly insisted on protracting the litigation for a period of seven more years. The course of litigation, and the tactics of the defendants to forestall complying with the law was summarized by Mr. Justice Clark, in the opinion below:

> It has been pending almost ten years, has been to this court twice, has consumed hundreds of hours of court time of four trial judges, accumulated thousands of pages of motions, written interrogatories, briefs, arguments, opinions, etc. some 1200 pages of testimony, two panels of judges of this court and literally thousands of hours of counsel time. The record shows that it took six months for Cole to secure his temporary injunction, largely because of dilatory action of the union and its officers; seven years to get his trial and now two years to obtain final vindication of a right not only specifically secured to him by the Act itself but fundamental to a free society as well. 462 F.2d at 780.

All the district court found was that the defendants were in good faith when they expelled the plaintiff in 1962, prior to the decision in *Salzhandler* v. *Caputo, supra.* But any good faith belief that this expulsion was legal could scarcely have survived after the Court of Appeals' explicit language in affirming the temporary injunction in 1965. As the court below noted, "it is manifestly clear that Cole's conduct was protected," 462 F.2d at 779, but even as late as 1972, the defendant was making an argument "virtually identical to that rejected" in the *Giordani, supra,* and *Farowitz, supra,* cases, decided four and eight years before. Con-

tinued refusal by the union after that date, to void the expulsion, constituted "unreasonable, obdurate obstinancy," *Bradley* v. *School Board of City of Richmond, Virginia, supra,* entitling the plaintiff to counsel fees.

F. *The Limited Burden on the Union*

Appellant has argued that awarding counsel fees to plaintiffs whose Title I rights have been violated would deplete the local union's treasury and "most seriously weaken, undermine and vitiate the local union's organizational and representative essential strength." This argument proceeds from three premises which need only to be articulated to be disproved.

The first premise is that encouraging and protecting the democratic rights in unions does not strengthen and vitalize the union organization in representing its members. This is contrary to the determination of Congress in enacting the Act, and it is contrary to the labor movements own concern with strengthening democratic processes in unions. Summers, *American Legislation for Union Democracy,* 25 Mod. L. Rev. 273, 275-6 (1962). The AFL-CIO Ethical Practice Code on Democratic Process declares:

> Freedom and democracy are essential attributes of our movement. Labor organizations lacking these attributes are unions in name only. Authoritarian control is contrary to the spirit, the tradition and the reasons which should govern and guide our movement.

The second premise is that local unions, unfamiliar with legal rules and procedures, will make innocent mistakes with costly consequences. But union constitutions custom-

arily provide for appeals to international officers, and Section 101(a)(4) requires a member to exhaust reasonable procedures available within four months. *Detroy* v. *American Guild of Variety Artists,* 286 F.2d 75 (2d Cir. 1961). The union has ample opportunity for review and self-correction prior to suit. Ultimate responsibility for a member being forced to sue to obtain recognition of his Title I rights rests on the top officers of the international union, who have available advice of competent counsel.

The third premise is that the individual plaintiff can better bear the burden than the local union. The function of the suit and its fruit is strengthening and vitalizing the internal processes of the unions, giving greater protection to the democratic rights of members. These fruits would not be enjoyed but for the plaintiff's suit. The simple question is who should bear the cost. If the union recognizes and appreciates the value of what the plaintiff has done, it should willingly pay. *Johnson* v. *Nelson,* 325 F.2d 646 (8th Cir. 1963).

II.

Congress did not preclude courts of equity from awarding counsel fees in Title I suits.

The award of counsel fees requires no express statutory authorization, *Mills* v. *Electric Auto-Lite,* 396 U.S. 375 (1970), for "the foundation for the historic practice of granting reimbursements for the costs of litigation other than the conventional taxable costs is part of the original authority of the chancellor to do equity in a particular situation," *Sprague* v. *Ticonic National Bank,* 307 U.S. 161, 166 (1939). "Allowance of such costs in appropriate situations

is part of the historic equity jurisdiction of the federal courts." *Id.* at 164.

Suits under Title I which enforce the Congressional policy of democratic unionism and which thereby benefit the union and its members fall within the class of cases in which the courts of equity have exercised their authority to award counsel fees. The courts retain that historic authority unless Congress has manifested an intent to preclude its exercise. Where the award of counsel fees is necessary to effectuate basic policies of Congress or to require those who have benefited from a suit to bear its costs, the intent of Congress to bar such awards ought not be inferred, "absent the positive interposition by Congress of a barrier to judicial allowance of attorney's fees." *Yablonski* v. *United Mine Workers of America,* 466 F.2d 424, 430 (C.A. D.C. 1972).

A. *The Words of Title I*

Nothing in the words of Title I preclude courts from awarding counsel fees in appropriate cases. On the contrary. Section 102, provides:

> Any person whose rights secured by the provisions of this title have been infringed by any violation of the title may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate.

It would be difficult to design words which would more clearly express the intent that the courts should have the full panoply of equitable remedies, including the award of counsel fees. To insure that no existing rights or remedies would be lost, Congress added Section 103, providing:

> Nothing contained in this title shall limit the rights and remedies of any member of a labor organization under any State or Federal law or before any court or other tribunal . . .

B. *The Negative Inference Drawn From Other Sections*

The clear import of the words of Title I, that the courts retain their historic equitable authority to award counsel fees, is sought to be overcome by looking to other sections in other titles of the Act. The argument is that because Congress in Section 201(c), and in Section 501(b), expressly provided for recovery of counsel fees, its failure to make a similar express provision in Section 102 shows an intent to preclude award of counsel fees in suits brought under Section 102. This argument places more weight on a negative inference than it can bear.

First, the historic authority of the court of equity to grant the remedies which justice requires, confirmed in its full measure by the unqualified words of Section 102, cannot be so readily overridden. In *Mills, supra,* the Court awarded counsel fees in a suit brought under Section 14(a) of the Securities Exchange Act of 1934. That section, like Section 102 here, contained no express authorization for such an award, but two other sections, Section 9(e) and Section 18(a) expressly provided for recovery of attorney's fees in other cases. In response to the same argument from negative inference, the Court declared:

> We agree with the Second Circuit that the specific provisions in Sections 9(e) and 18(a) should not be read as denying to the courts the power to award counsel fees in suits under other sections of the Act when

circumstances make such an award appropriate. 396 U.S. at 390-1.

The case of *Fleischman Corp.* v. *Maier Brewing Company,* 386 U.S. 714 (1967) is clearly distinguishable. The Court there held that the remedial provisions of the Lanham Act precluded an award of attorneys' fees in a suit for trademark infringement. Suit had been brought under Section 35 of the Lanham Act which expressly provided that the plaintiff was entitled "subject to the principles of equity, to recover (1) defendant's profits, (2) any damages sustained by the plaintiff, and (3) the costs of the action. . . . In assessing damages the court may enter judgment, according to the circumstances of the case, for any sum above the amount found as damages, not exceeding three times such amount." 15 U.S.C. 1117. It was this provision to which the Court referred when it said that "Congress had meticulously detailed the remedies available to the plaintiff," 386 U.S. at 719, and it was into the very section which provided "meticulously detailed" remedies that the plaintiff wanted to read in a right to counsel fees. In addition, several attempts to add to Section 35, an express provision allowing recovery of counsel fees, had failed of enactment. It was from this that the Court concluded that Congress "intended Section 35 to mark the boundaries of power to award monetary relief in cases arising under the Act." 386 U.S. at 714.

The case before the Court bears no resemblance to *Fleischman.* Section 102 does not prescribe "meticulously detailed" remedies like those in Section 35 of the Lanham Act. On the contrary, Section 102 provides for the full

range of equitable remedies in the most general terms. No attempts have been made to write into Section 102 an express provision for counsel fees, and never during the legislative history of the Act was any such addition proposed.

Second, the argument, resting as it does on the different wording in different sections, assumes that the statute was a carefully drafted and closely integrated code. It assumes that the wording of each section was precisely drawn with reference to and in comparison with the wording of every other section. The very structure of the statute contradicts this assumption. The statute consists of six separate titles, each one dealing with a separate problem area, each one standing almost wholly independent of the others, with its own substantive and remedial provisions. The titles do not always mesh smoothly, and the courts are left with the task of reconciling and integrating. See *Calhoon* v. *Harvey,* 379 U.S. 134 (1964); *Grand Lodge of Machinists* v. *King,* 335 F.2d 340 (9th Cir. 1964); *United Brotherhood of Carpenters & Joiners* v. *Brown,* 343 F.2d 872 (10th Cir. 1965).

The statute was not precisely worded and tightly integrated because major portions were changed or added during the course of debate. This was particularly true of Title I, which was added as an amendment on the floor of the Senate, II Leg. Hist. 1102, and then subject to so many amendments that when it was voted, many Senators did not know what it contained. II Leg. Hist. 1229. To read Section 102 by comparing it with Sections 201(c) and 501 (b), and to find in its lack of express provision for award of counsel fees, is to read the statute divorced from the realities of its legislative history. It is to a more detailed examination of that history that we now turn.

C. *Legislative History of Section 102*

On April 15, 1959, the Senate began debate on S. 1555, reported by the Committee on Labor and Public Welfare, II Leg. Hist. 1020. It consisted of five titles regulating internal union affairs and a sixth title containing amendments to the National Labor Relations Act. S. Rep. No. 197, 86th Cong., 1st sess. 1959, I Leg. Hist. 397. One week later, on April 22, 1959, Senator McClellan offered as amendment to S. 1555, an entirely new title to be inserted as Title I—Bill of Rights of Members of Labor Organizations. II Leg. Hist. 1102.

The Bill of Rights, as introduced by Senator McClellan, had two enforcement provisions. Section 102 made willful interference with the exercise of any right guaranteed in Section 101 punishable by a fine up to $10,000 and imprisonment of not more than two years. Section 103 provided that in case of violation or threatened violation of the title, the Secretary of Labor might bring an action "for such relief as may be appropriate including, but without limitation, injunctions to restrain any such violations and to compel compliance with this title." *Ibid.*

At this point it should be noted that these provisions marshalled the maximum enforcement power to secure the rights guaranteed to union members—severe criminal penalties and unlimited injunctive relief. And this protection was to be provided without any burden on the individual union member for litigation costs or counsel fees.

As pointed out earlier in this brief, these enforcement sections were criticized during the Senate debate because of their similarity to provisions proposed in civil rights legislation the year before, because the Secretary might be

overwhelmed by the burden of cases, and because the severe criminal penalties might fall on innocent union officers. No one suggested that the civil remedies should be more limited; on the contrary, the argument was that authorizing the individual to sue would make them more effective. Nor did anyone suggest that the cost of enforcing these rights should be placed on the aggrieved individual member.

After more than 100 amendments were submitted, II Leg. Hist. 1229, none of which changed the enforcement sections, the Bill of Rights was adopted on the same day it was introduced, and was passed by a one vote margin. II Leg. Hist. 1119. Two days later, Senator Kuchel, on behalf of himself and eight other Senators, submitted as an amendment a redrafted version of the Bill of Rights to be substituted for the one originally adopted. II Leg. Hist. 1220. This was submitted at 10 o'clock at night before the proposed amendment had even been printed. II Leg. Hist. 1223. It was introduced at that late hour and before it had been printed because debate on the entire bill was drawing to a close and a vote had been planned for that night. II Leg. Hist. 1229.

The following day, in introducing debate, Senator Kuchel explained that when the text of the Bill of Rights had been printed as amended, he and many other Senators became aware that its language created many problems. As a result, a number of Senators, including both some who had voted for and some who had voted against the Bill of Rights originally, had agreed on a redrafted version. II Leg. Hist. 1229.

Senator Kuchel's amendment eliminated suits by the Secretary of Labor and substituted suits by individual members. Section 102 of this amendment provided:

> Any person whose rights secured by the provisions of this title have been infringed may bring an action in a district court of the United States for such relief as may be appropriate.

This is identical to the wording in Section 102, except that the parenthetical words "(including injunctions)," which were in neither S.1555 as it passed the Senate, nor in H.R. 8342 as it passed the House, II Leg. Hist. 1694. They were added by the Conference Committee, without any explanation. H. Rep. No. 1147, 86th Cong., 1st sess., I Leg. Hist. 934.

Senator Kuchel characterized this change in the method of enforcement a "major change," II Leg. Hist. 1230, but his only explanation was that "giving this type of right to the aggrieved employee member himself is in the interest of justice." * Its importance, apparently, was that it enabled a number of senators, who had originally voted against the Bill of Rights because of its similarity to civil rights legislation which they had opposed the preceding year, to change their votes and support the revised version. See speech of Senator Johnston, II Leg. Hist. 1223.

Nothing in the Senate debate suggested that the union member who sued to enforce the rights guaranteed should have limited remedies or that the words "such relief as may be appropriate" should have any shorter reach than the historic equity powers of the federal courts.

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* Immediately thereafter, Senator Kuchel described the effect of the much less explicit words of Section 40(c), "enforceable at the suit of any bona fide candidate for union office in the district court of the United States" as entitling the court "to give such relief as it deems equitable under all the circumstances." II Leg. Hist. 6021.

The Kuchel amendment was adopted by a vote of 77 to 14, II Leg. Hist. 1239, and the same day S.1555 was passed by a vote of 90 to 1, Senator Goldwater casting the sole dissenting vote.

Six weeks later, Senator Goldwater submitted a 30,000 word criticism of S.1555 to the House Committee on Education and Labor. II Leg. Hist. 1280-1293. His criticisms ranged over almost every section in all seven titles. Buried in this barrage of criticism was one paragraph criticizing the failure of Section 102 to grant to the successful plaintiff the right of counsel fees. In making this criticism, he showed no awareness that the words "such relief as may be appropriate" would, on their face, embrace the whole panoply of equitable remedies, including the award of counsel fees in appropriate cases, but apparently assumed that an express grant was necessary for courts to grant such relief. Moreover, it should be noted, that during the Senate debate on the Kuchel amendment, he accepted the change in Section 102 because of "a reasonable objection" of our "southern friends." II Leg. Hist. 1238. Seen in context, Senator Goldwater's statement did not represent any understanding on the part of any senator. It represented only his grasping for any imaginary stick with which to flay the bill which he alone had voted against.

H.R. 8342, as reported out by the House Committee on Education and Labor, H. Rep. No. 741, 86th Cong., 1st Sess., I Leg. Hist. 759, provided for enforcement of Title I rights through suits by individual members. Section 102(b) provided

> If, upon a preponderance of the evidence after a trial upon the merits, the court finds that a violation of

> Section 101 has occurred, the court shall have jurisdiction to restrain such violation and to grant such other and further relief as may be appropriate.

Representative Elliott, in defending the Committee bill, stated that this section "gives it [the court] a wide latitude to grant relief according to the necessities of the case." II Leg. Hist. 1584.

Dissenters from the House Report included as one ground for criticism of S.1555, that "Under that bill the individual member must shoulder the burden of litigation costs himself. The union officers, on the other hand, have the entire resources of the union at their disposal." II Leg. Hist. 853. These dissenters, at the end of their criticisms, concluded, "For the reasons outlined above, we intend to support on the floor of the House the so-called Landrum-Griffin bill." II Leg. Hist. 856. Among the signers of this was Representative Griffin.

But the Landrum-Griffin bill which these dissenters supported, and which was drafted by one of them, contained in Section 102, the very words now in the statute. The clear implication is that they believed and intended, in a Humpty Dumpty fashion, that these words carried with them recognition of the equity court's historic authority to award counsel fees for successful suits to enforce rights guaranteed by Title I.

The shadow cast on Section 102 in the entire legislative history comes from the statements of Senator Goldwater and the dissenters from the House Report. But these statements, seen in their context, demonstrate only that which is

well-known, that no light on Congressional intent in enacting a statute will be found in the denunciations of its detractors. It would be bitter irony and an affront to common sense if the statements of those who wanted union members to have the most effective remedies available should be used as reasons for depriving members of the one remedy they most need to make the other remedies real.

Although the legislative history is not explicit, Congressional intent on the critical issue emerges quite plainly. Congress intended that the courts, in granting "such relief as may be appropriate" for violation of the basic democratic rights should give such relief as might be necessary to make those rights effective. Congress did not intend that Section 102 should mean less than it said, that courts should not have full authority to grant relief "according to the necessities of the case." Not a single line of legislative history suggests that any supporter of the Bill of Rights as enacted wanted or intended to deprive courts of their power to award counsel fees in appropriate cases.

CONCLUSION

For the reasons set forth above, the decision below should be affirmed.

Respectfully submitted,

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March, 1973

(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

HALL ET AL. *v.* COLE

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 72-630. Argued March 21, 1973—Decided May 21, 1973

Respondent, expelled from his union for deliberate and malicious vilification of union management following his resolutions unsuccessfully condemning that management's alleged undemocratic actions and shortsighted policies, regained his union membership in a suit under § 102 of the Labor-Management Reporting and Disclosure Act (LMRDA) and was awarded $5,500 in legal fees. The Court of Appeals affirmed. *Held:*

1. Respondent's suit under § 102 of the LMRDA vindicated not only his own rights of free speech guaranteed by the statute but furthered the interests of the union and its members as well. As a result, the award to respondent of attorneys' fees under these circumstances comported with the trial court's inherent equitable power of making such an award whenever overriding considerations indicate the need for such recovery. *Hall* v. *Electric Auto-Lite Co.*, 396 U. S. 375, 391–392. Pp. 4–7.

2. The allowance of counsel fees to the successful plaintiff in a suit brought under § 102 is not precluded by that statutory provision and, indeed, is supported by the legislative history of the LMRDA. Pp. 8–12.

3. Under all the facts of the case, the District Court did not abuse its discretion in awarding counsel fees to respondent. Pp. 12–14.

462 F. 2d 777, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which BURGER, C. J., and DOUGLAS, STEWART, BLACKMUN, and POWELL, JJ., joined. WHITE, J., filed a dissenting opinion, in which REHNQUIST, J., joined. MARSHALL, J., took no part in the consideration or decision of the case.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 72-630

Paul Hall, Etc., et al., Petitioners, *v.* John Cole.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[May 21, 1973]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

This case requires us to consider the propriety of an award of counsel fees to a successful plaintiff in a suit brought under § 102 of the Labor-Management Reporting and Disclosure Act of 1959, 29 U. S. C. § 412.[1] On August 6, 1962, at a regular meeting of the membership of petitioner Seafarers International Union of North America—Atlantic, Gulf, Lakes and Inland Waters District, respondent introduced a set of resolutions alleging various instances of undemocratic actions and shortsighted policies on the part of union officers. The resolutions were defeated and, on November 26, 1962, respondent was expelled from the union on the ground that his presentation of the resolutions violated a union rule proscribing "deliberate and malicious vilification with regard to the execution or the duties of any office or job." After exhausting his intra-union remedies, respondent

[1] Section 102 of the Act, 29 U. S. C. § 412, provides in pertinent part:

"Any person whose rights secured by the provisions of this subchapter have been infringed by any violation of this subchapter may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate."

filed this suit under § 102 of the LMRDA, claiming that his expulsion under these circumstances violated his right of free speech as secured by § 101 (a)(2) of the Act, 29 U. S. C. § 411 (a)(2).[2]

On May 27, 1964, the United States District Court for the Eastern District of New York issued a temporary injunction restoring respondent's membership in the union, and the United States Court of Appeals for the Second Circuit affirmed. 339 F. 2d 881 (1965). Some five years later, the case came on for trial and the District Court, finding a violation of respondent's rights under § 101 (a)(2), ordered him permanently reinstated to membership in the union and, although denying respondent's damage claims,[3] granted him counsel fees in the sum of $5,500 against the union. The Court of

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[2] Section 101 (a)(2) of the Act, 29 U. S. C. § 411 (a)(2), provides: "Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: *Provided*, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations."

[3] In its unreported opinion, the District Court found that respondent "suffered no loss of wages as a result of his expulsion from the union." And although respondent "was deprived of his right to attend meetings and run for union office" during the period of his expulsion, the District Court concluded that "[t]he record is barren of any proof on which the court might make a determination of the value of [these rights]." Finally, the court denied respondent's claim for punitive damages on the ground that the union's decision to expel respondent was motivated neither by malice nor bad faith.

Appeals affirmed in all respects, 462 F. 2d 777 (CA2 1972). We granted certiorari limited to the questions whether (1) an award of attorneys' fees is permissible under § 102 of the LMRDA, and (2) if so, whether such an award under the facts of this case constituted an abuse of the District Court's discretion. 409 U. S. 1074–1075. We affirm.

I

Although the traditional American [4] rule ordinarily disfavors the allowance of attorneys' fees in the absence of statutory [5] or contractual authorization, [6] federal courts, in the exercise of their equitable powers, may award attorneys' fees when the interests of justice so require. Indeed, the power to award such fees "is part of the original authority of the chancellor to do equity in a particular situation," *Sprague* v. *Ticonic National Bank*, 307 U. S. 161, 166 (1939), and federal courts do not hesi-

[4] The American rule, it might be noted, is more restrictive than the general rule that prevails in most other nations. See, *e. g.*, Ehrenzweig, Reimbursement of Counsel Fees and the Great Society, 54 Calif. L. Rev. 792, 793 (1966). Many commentators have argued for a "liberalization" of the American rule. See, *e. g.*, Stoebuck, Counsel Fees Included in Costs: A Logical Development, 38 U. Colo. L. Rev. 202 (1966); Ehrenzweig, *supra*; Kuenzel, The Attorney's Fee: Why Not a Cost of Litigation?, 49 Iowa L. Rev. 75 (1963); McCormick, Counsel Fees and Other Expenses of Litigation as an Element of Damages, 15 Minn. L. Rev. 619 (1931); Comment, The Allocation of Attorney's Fees After *Mills* v. *Electric Auto-Lite Co.*, 38 U. Chi. L. Rev. 316 (1971); Note, Attorney's Fees: Where Shall the Ultimate Burden Lie?, 20 Vand. L. Rev. 1216 (1967).

[5] See, *e. g.*, Clayton Act, § 4, 38 Stat. 731, 15 U. S. C. § 15; Communications Act of 1934, § 206, 48 Stat. 1072, 47 U. S. C. § 206; Interstate Commerce Act, § 16, 34 Stat. 590, 49 U. S. C. § 16 (2); Securities Exchange Act of 1934, §§ 9 (e), 18 (a), 48 Stat. 890, 897, 15 U. S. C. §§ 78i (e), 78r (a).

[6] See, *e. g.*, *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U. S. 714, 717 (1967); *Hauenstein* v. *Lynham*, 100 U. S. 483 (1880); *Day* v. *Woodworth*, 13 How. (54 U. S.) 363 (1852).

tate to exercise this inherent equitable power whenever "overriding considerations indicate the need for such a recovery." *Mills* v. *Electric Auto-Lite Co.*, 396 U. S. 375, 391–392 (1970); see *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U. S. 714, 718 (1967).

Thus, it is unquestioned that a federal court may award counsel fees to a successful party when his opponent has acted "in bad faith, vexatiously, wantonly, or for oppressive reasons." 6 Moore's Federal Practice 1352 (1966 ed.); see, *e. g.*, *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U. S. 400, 402 n. 4 (1968); *Vaughan* v. *Atkinson*, 369 U. S. 527 (1962); *Bell* v. *School Bd. of Powhatan County*, 321 F. 2d 494 (CA4 1963); *Rolax* v. *Atlantic Coast Line R. Co.*, 186 F. 2d 473 (CA4 1951). In this class of cases, the underlying rationale of "fee-shifting" is, of course, punitive, and the essential element in triggering the award of fees is therefore the existence of "bad faith" on the part of the unsuccessful litigant.

Another established exception involves cases in which the plantiff's sucessful litigation confers "a substantial benefit on the members of an ascertainable class, and where the court's jurisdiction over the subject matter of the suit makes possible an award that will operate to spread the costs proportionately among them." *Mills* v. *Electric Auto-Lite, supra,* at 393–394.[7] "Fee-shifting"

[7] This exception has its origins in the "common-fund" cases, which have traditionally awarded attorneys' fees to the successful plaintiff when his representative action creates or traces a "common-fund," the economic benefit of which is shared by all members of the class. See, *e. g.*, *Central Railroad & Banking Co.* v. *Pettus*, 113 U. S. 116 (1885); *Trustees* v. *Greenough*, 105 U. S. 527 (1882). In *Sprague* v. *Ticonic National Bank, supra,* the rationale of these cases was extended to authorize an award of attorneys' fees to a successful plaintiff who, although suing on her own behalf rather than as representative of a class, nevertheless established the right of others to recover out of specific assets of the same defendant through the operation of *stare decisis*. In reaching this result, the Court explained that the beneficiaries of the plaintiff's litigation could be

is justified in these cases, not because of any "bad faith" of the defendant but, rather, because "[t]o allow the others to obtain full benefit from the plaintiff's efforts without contributing equally to the litigation expenses would be to enrich the others unjustly at the plaintiff's expense." *Id.*, at 392; see also *Fleischmann Distilling Corp.* v. *Maier Brewing Co., supra,* at 719; *Trustees* v. *Greenough,* 105 U. S. 527, 532 (1882). Thus, in *Mills* v. *Electric Auto-Lite Co., supra,* we approved an award of attorneys' fees to successful shareholder plaintiffs in a suit brought to set aside a corporate merger accomplished through the use of a misleading proxy statement in violation of § 14 (a) of the Securities Exchange Act of 1934, 15 U. S. C. § 78n (a). In reaching this result, we reasoned that, since the dissemination of misleading proxy solicitations jeopardized important interests of both the corporation and " 'the stockholders as a group,' " [8] the successful enforcement of the statutory

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made to contribute to the costs of the suit by an order reimbursing the plaintiff out of the defendant's assets from which the beneficiaries eventually would recover. Finally, in *Mills* v. *Electric Auto-Lite Co., supra,* we held that the rationale of these cases must logically extend, not only to litigation that confers a monetary benefit on others, but also to litigation " 'which corrects or prevents an abuse which would be prejudicial to the rights and interests' " of those others. *Id.*, at 396, quoting *Bosch* v. *Meeker Cooperative Light & Power Assn.*, 257 Minn. 362, 367, 101 N. W. 2d 423, 427 (1960).

Citing our decisions in *Mills* and *Newman* v. *Piggie Park Enterprises, Inc., supra,* respondent contends that the award of attorneys' fees in this case might also be justified on the ground that, by successfully prosecuting this litigation, respondent acted as a " 'private attorney general' vindicating a policy that Congress considered of highest priority." *Newman* v. *Piggie Park Enterprises, Inc., supra,* at 402. See also *Knight* v. *Auciello,* 453 F. 2d 852 (CA1 1972); *Lee* v. *Southern Home Sites Corp.*, 444 F. 2d 143 (CA5 1971). In light of our conclusion with respect to the "common benefit" rationale, however, we have no occasion to consider that question.

[8] *Mills* v. *Electric Auto-Lite Co., supra,* at 392, quoting *J. I. Case Co.* v. *Borak,* 377 U. S. 426, 432 (1964).

policy necessarily "rendered a substantial service to the corporation and its shareholders." *Mills* v. *Electric Auto-Lite Co., supra,* at 396. Under these circumstances, reimbursement of the plaintiffs' attorneys' fees out of the corporate treasury simply shifted the costs of litigation to "the class that has benefited from them and that would have had to pay them had it brought the suit." *Id.,* at 397.

The instant case is clearly governed by this aspect of *Mills.* The Labor-Management Reporting and Disclosure Act of 1959 was based, in part, on a congressional finding "from recent investigations in the labor and management fields, that there have been a number of instances of breach of trust, corruption, disregard of the rights of individual employees, and other failures to observe high standards of responsibility and ethical conduct. . . ." 29 U. S. C. § 401 (b). In an effort to eliminate these abuses, Congress recognized that it was imperative that all union members be guaranteed at least "minimum standards of democratic process. . . ." [9] Thus, Title I [10] of the LMRDA—the "Bill of Rights of Members of Labor Organizations"—was specifically designed to promote the "full and active participation by the rank and file in the affairs of the union," [11] and, as the Court of Appeals noted, the rights enumerated in Title I [12] were deemed "vital to the in-

[9] 105 Cong. Rec. 5806 (1959) (Sen. McClellan).

[10] 29 U. S. C. §§ 411–415.

[11] *American Federation of Musicians* v. *Wittstein,* 379 U. S. 171, 182–183 (1964).

[12] In addition to the Tit. I guarantee of freedom of speech and assembly involved in this case, 29 U. S. C. § 411 (a)(2), see n. 2, *supra,* Tit. I also guarantees equal "political" rights to all union members, 29 U. S. C. § 411 (a)(1); stability and fairness in the assessment of dues, initiation fees and other assessments, 29 U. S. C. § 411 (a)(3); the right of all union members to sue and to participate in litigation, 29 U. S. C. § 411 (a)(4); and procedural fairness in the discipline process, 29 U. S. C. § 411 (a)(5).

dependence of the membership and the effective and fair operation of the union as the representative of its membership." 462 F. 2d, at 780. See also *International Assn. of Machinists* v. *Nix*, 415 F. 2d 212 (CA5 1969); *Salzhandler* v. *Caputo*, 316 F. 2d 445 (CA2 1963).

Viewed in this context, there can be no doubt that, by vindicating his own right of free speech guaranteed by § 101 (a)(2) of Title I of the LMRDA, respondent necessarily rendered a substantial service to his union as an institution and to all of its members. When a union member is disciplined for the exercise of any of the rights protected by Title I, the rights of all members of the union are threatened. And, by vindicating his own right, the successful litigant dispels the "chill" cast upon the rights of others. Indeed, to the extent that such lawsuits contribute to the preservation of union democracy, they frequently prove beneficial "not only in the immediate impact of the results achieved but in their implications for the future conduct of the union's affairs." *Yablonski* v. *United Mine Workers of America*, — U. S. App. D. C. —, 466 F. 2d 424, 431 (1972). Thus, as in *Mills*, reimbursement of respondent's attorneys' fees out of the union treasury [13] simply shifts the costs of litigation to "the class that has benefited from them and that would have had to pay them had it brought the suit." *Mills* v. *Electric Auto-Lite Co., supra*, at 397. See also *Yablonski* v. *United Mine Workers of America, supra; Robins* v. *Schonfeld*, 326 F. Supp. 525 (SDNY 1971); *Cefalo* v. *International Union of District 50*

[13] Petitioners contend that the payment of counsel fees out of the union treasury might deplete union funds to such an extent as to impair the union's ability to operate as an effective collective bargaining agent and to endanger union stability. Although this consideration is undoubtedly an important one, it is relevant, not to the *power* of federal courts to award counsel fees generally, but, rather, to the exercise of the District Court's discretion on a case-by-case basis. See n. 23, *infra*.

United Mine Workers, 311 F. Supp. 946 (DC 1970); *Sands* v. *Abelli*, 290 F. Supp. 677 (SDNY 1968). We must therefore conclude that an award of counsel fees to a successful plaintiff in an action under § 102 of the LMRDA falls squarely within the traditional equitable power of federal courts to award such fees whenever "overriding considerations indicate the need for such recovery." *Mills* v. *Electric Auto-Lite Co.*, *supra*, at 391–392.

II

This does not end our inquiry, however, for even where "fee-shifting" would be appropriate as a matter of equity, Congress has the power to circumscribe such relief. In *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, *supra*, for example, we held that § 35 of the Lanham Act, 15 U. S. C. § 117, precluded an award of attorneys' fees as a separate element of recovery in a suit for deliberate infringement of a trademark. In reaching that result, we reasoned that, since § 35 "meticulously detailed the remedies available to a plaintiff who proves that his valid trademark has been infringed," Congress must have intended the express remedial provisions of § 35 "to mark the boundaries of the power to award monetary relief in cases arising under the Act." *Id.*, at 719, 721. Petitioners contend that this reasoning dictates a similar conclusion with respect to § 102 of the LMRDA. We do not agree. Unlike § 35 of the Lanham Act, which specifically "provided not only for injunctive relief, but also for compensatory recovery measured by the profits that accrued to the defendant by virtue of his infringement, the costs of the action, and damages which may be trebled." [14] § 102 of the LMRDA broadly authorizes the courts to grant "such relief (including injunctions) as may be appropriate." 29 U. S. C. § 412. Thus, § 102

[14] *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, *supra*, at 719.

does not "meticulously detail the remedies available to a plaintiff," and we cannot fairly infer from the language of that provision an intent to deny to the courts the traditional equitable power to grant counsel fees in "appropriate" situations.

Petitioners argue further, however, that because Congress expressly authorized the recovery of counsel fees in §§ 201 (c) and 501 (b) of the LMRDA, 29 U. S. C. §§ 431 (c), 501 (b), the absence of a similar express provision in § 102 indicates an intent to preclude "fee-shifting" in suits brought under that section. Sections 201 (c) and 501 (b), which are not a part of Title I, deal with narrowly defined problems under the Act, and specifically authorize such limited remedies as an examination of the union's books and records and an accounting.[15] By contrast, § 102 was premised upon the fact that Title I litigation necessarily demands that remedies "be tailored to fit facts and circumstances admitting of almost infinite variety," [16] and § 102 was therefore cast as a broad mandate to the courts to fashion "appropriate" relief. Indeed, any attempt on the part of Congress to spell out all of the remedies available under § 102 would create the "danger that those [remedies] not listed might be proscribed with the result that the courts would be fettered in their efforts to 'grant relief according to the necessities of the case.'" *Gartner* v. *Soloner*, 384 F. 2d 348, 353 (CA3 1961). See *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, *supra*. Confronted with a virtually identical situation in *Mills*, we explained that the inclu-

[15] Section 201 (c) provides for the award of counsel fees in a suit brought by a union member to obtain access to union books, records and accounts to verify annual financial statements. 29 U. S. C. § 431 (c). Section 501 (b) authorizes "fee-shifting" in a suit brought by a member against a union official to recover damages or for an accounting for the benefit of the union on the ground that the official is violating his duties. 29 U. S. C. § 501 (b).

[16] *Gartner* v. *Soloner*, 384 F. 2d 348, 353 (CA3 1961).

sion in certain sections of the Securities Exchange Act of 1934 of express provisions for recovery of attorneys' fees "should not be read as denying to the courts the power to award counsel fees in suits under other sections of the Act when circumstances make such an award appropriate. . . ." *Mills* v. *Electric Auto-Lite Co., supra,* at 390–391. That reasoning is equally persuasive today.[17]

Finally, petitioners call our attention to two isolated comments in the legislative history of Title I—one by Senator Goldwater in his testimony before a House Committee[18] and the other contained in a dissenting statement to a House Committee Report[19]—expressing the

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[17] Indeed, the *Mills* reasoning may be particularly appropriate with respect to the LMRDA. As Professor Cox has noted, "because much of the bill was written on the floor of the Senate or House of Representatives and because many sections contain calculated ambiguities or political compromises . . . , the courts would be well advised to seek out the underlying rational without placing great emphasis upon close construction of the words," Cox, Internal Affairs of Labor Unions Under the Reform Act of 1959, 58 Mich. L. Rev. 819, 852 (1960).

[18] In his testimony before the House Committee on Education and Labor, after passage of the Senate version of the LMRDA, Senator Goldwater stated that "the bill does not grant [the union member], even where successful in his suit, reasonable counsel fees or other costs. It thus forces him to assume the entire financial burden of the litigation. For an ordinary rank-and-file union member who is generally a wage worker, such a litigation thus becomes an impossible financial burden." 105 Cong. Rec. 10095 (1959).

[19] In opposing the reporting of the Elliott Bill, H. R. 8342, 86th Cong., 1st Sess. (1959), to the House, the nine dissenting Members of the House Committee on Education and Labor protested that "[u]nder that bill the individual member must shoulder the burden of litigation costs himself." H. R. Rep. No. 741, 86th Cong., 1st Sess., 95 (1959). At the end of their criticisms of the Elliott Bill, the dissenters explained that "[f]or the reasons outlined above, we intend to support . . . the so-called Landrum-Griffin bill (H. R. 8400 and 8401)." *Id.*, at 98. Thus, although the enforcement provisions of the Elliott Bill and the Landrum-Griffin Bill were virtually identical, the dissenters apparently believed that the latter, which

fear that, in the absence of a specific provision for the award of counsel fees, such relief would be unavailable in suits brought under § 102. Although these statements plainly indicate "a feeling by some members of the Congress that it would have been desirable and prudent to spell out unmistakably a right to attorney's fees," they "hardly amount to a definitive and absolute setting of the Congressional face against the giving of such incidental relief by the courts where compatible with sound and established equitable principles." *Yablonski v. United Mine Workers of America*, *supra*, at 429. See *Gartner v. Soloner*, *supra*, at 352. Indeed, both of these comments expressly *favored* the allowance of counsel fees in Title I litigation, and there is no suggestion anywhere in the legislative history that even a single member of Congress was opposed to such relief or desired the words "such relief . . . as may be appropriate" to restrict the historic equity powers of the federal courts. On the contrary, there are numerous expressions by sponsors and other supporters of the Act indicating that § 102 was intended to afford the courts "a wide latitude to grant relief according to the necessities of the case," [20] and "to give such relief as [the court] deems equitable in all the circumstances." [21]

Moreover, the award of attorneys' fees under § 102 is clearly consonant with Congress' express desire to adopt "legislation that will afford necessary protection of the rights and interests of employees and the public generally. . . ." 29 U. S. C. § 401 (b). As the Court of Appeals recognized,

> "[n]ot to award counsel fees in cases such as this would be tantamount to repealing the Act itself by

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eventually was enacted, allowed the union member to recover counsel fees.

[20] 105 Cong. Rec. 15547–15548 (1959) (Rep. Elliott).

[21] *Id.*, at 6717 (Sen. Kuchel). See *id.*, at 14356 (Rep. O'Hara); see also 29 U. S. C. §§ 413, 523 (a).

> frustrating its basic purpose. It is difficult for individual members of labor organizations to stand up and fight those who are in charge. The latter have the treasury of the union at their command and the paid union counsel at their beck and call while the member is on his own. . . . An individual union member could not carry such a heavy financial burden. Without counsel fees the grant of federal jurisdiction is but an empty gesture for few union members could avail themselves of it." 462 F. 2d, at 780–781.

Thus, it is simply "untenable to assert that in establishing the bill of rights under the Act Congress intended to have those rights diminished by the unescapable fact that an aggrieved union member would be unable to finance litigation. . . ." *Gartner* v. *Soloner*, *supra*, at 355. See *Yablonski* v. *United Mine Workers of America*, *supra*, at 430; *Robins* v. *Schonfeld*, *supra*, at 531; *Sands* v. *Abelli*, *supra*, at 686; cf. *Newman* v. *Piggie Park Enterprises, Inc.*, *supra*, at 402. We therefore hold that the allowance of counsel fees to the successful plaintiff in a suit brought under § 102 of the LMRDA is consistent with both the Act and the historic equitable power of federal courts to grant such relief in the interests of justice.

III

Finally, petitioners maintain that the award of counsel fees to respondent under the facts of this case constituted an abuse of the District Court's discretion. Specifically, petitioners argue that the District Court's finding that some of respondent's actions "were, in part, motivated by [his] political ambitions for union office" represents a finding of "bad faith" on the part of respondent. The District Court clearly rejected the "logic" of this contention, and we agree. Title I of the LMRDA

was specifically designed to protect the union member's right to seek higher office within the union,[22] and we can hardly accept the proposition that the exercise of that right is tantamount to "bad faith." See *Yablonski* v. *United Mine Workers of America, supra,* at 430–431.

Petitioners also contend that the award of attorneys' fees in this case was improper because the District Court, in denying respondent's claim for punitive damages, found that "the defendants, in good faith, believed that they had a right to charge and discipline [respondent] for his actions." It is clear, however, that "bad faith" may be found, not only in the actions that led to the lawsuit, but also in the conduct of the litigation. And, as the Court of Appeals noted, the conduct of this particular litigation was marked by "the dilatory action of the union and its officers. . . ." 462 F. 2d, at 780. Moreover, although the presence of "bad faith" is essential to "fee-shifting" under a "punishment" rationale, neither the presence nor absence of "bad faith" is in any sense dispositive where attorneys' fees are awarded to the successful plaintiff under the "common benefit" rationale recognized in *Mills* and operative today. Under that theory, counsel fees are granted, not because of the "bad faith" of the defendant but, rather, because the litigation confers substantial benefits on an ascertainable class of beneficiaries. In that situation, the element of "bad faith" of the defendant is simply one of many considerations best ad-

[22] In describing to the Senate the various "offenses" for which a union member could be expelled under then-existing union constitutions, Senator McClellan pointed out in particular the "offense" of "applying for the position of another union man in office." He observed, with evident sarcasm, that "A member had better not do that. The officers have squatters' rights. Members had better not offer any competition. They had better not seek election. They had better not aspire to the presidency or the secretaryship, or they will be expelled or disciplined." 105 Cong. Rec. 5812 (1959).

dressed to the sound discretion of the District Court.[23] Under the facts of this case, we cannot say that the District Court abused that discretion.

The judgment of the Court of Appeals is

Affirmed.

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.

[23] Another such consideration is, of course, the extent to which the payment of the plaintiff's counsel fees out of the union treasury might impair the union's ability to operate effectively. See n. 13, *supra*. Here, petitioners do not, and indeed cannot, contend that the award of only $5,500 would in any sense jeopardize union stability.

SUPREME COURT OF THE UNITED STATES

No. 72–630

Paul Hall, Etc., et al., Petitioners, *v.* John Cole.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[May 21, 1973]

MR. JUSTICE WHITE, with whom MR. JUSTICE REHNQUIST joins, dissenting.

I would need a far clearer signal from Congress than we have here to permit awarding attorneys' fees in member-union litigation, which so often involves private feuding having no general significance. The award of fees in the occasionally successful and meritorious case will not be worth the litigation the Court's decision will invite and foster.